SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 307

ISBRANDTSEN-MOLLER CO., INC., APPELLANT,

vs.

THE UNITED STATES OF AMERICA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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82 Closed

DOCKET

Isbrandtsen-Moller Co., Inc.,

-against-

The United States of America, The Department of Commerce of the United States, The Shipping Board Bureau of the Department of Commerce of the United States, Daniel C. Roper, individually and as Secretary of Commerce of the United States, James C. Peacock, individually and as Director of the Shipping Board Bureau of the Department of Commerce of The United States, and Lamar Hardy, individually and as United States Attorney for the Southern District of New York, Defendants.

ATTORNEYS	ABSTRACT OF COSTS	
	To Whom Due	Amount
Davis, Polk, Wardwell, Gardiner & Reed, 15 Broad St.		$5.- 6.-
	"to set aside order of Secty. Comm. re: Seizure of U. S. Shipping Board"	

DATE	CASH ACCOUNT—PLAINTIFF	RECEIVED	DISBURSED
JAN 31 1936	DEPOSIT	10	
MAR 31 1936			5
MAY 29 1936	DEPOSIT	5	

DATE	CASH ACCOUNT—DEFENDANT	RECEIVED	DISBURSED

DATE	FILINGS, PROCEEDINGS, ETC.	No. of WORDS	CLERK'S FEES		Amounts Reported in Emolument Returns
			PLAINTIFF	DEFENDANT	
JAN - 3 1936	Filed Bill, Praecipe & Issued Subpoena (orig. & 1 dupl orig.)		5.-		
JAN - 3 1936	Filed affdt & Notice of Motion for interlocutory injunction - Ret 1/9/36.				
JAN - 7 1936	Filed order to show cause for interlocutory injunction Ret. 1/10/36. - & Marsh. let - Caffey J.				
JAN - 7 1936	Filed Subpoena & Marshal's Return P. S. on Homer S. Cummings				

DATE			FILINGS, PROCEEDINGS, ETC.	No. OF WORDS	CLERK'S F
MONTH	DAY	YEAR			PLAINTIFF
JAN	3	1936	Filed Bill, Praecipe & Issued Subpoena (1 orig. + 1 Dupl orig.)		5—
JAN	3	1936	Filed affdt & Notice of Motion for interlocutory injunction - Ret 1/9/36.		
JAN	7	1936	" Offd. order to show cause for interlocutory injunction Ret. 1/10/36. - Marsh. Ret. - Caffey, J.		
JAN	7	1936	Filed Subpoena & Marshal's Return P. S. on Homer S. Cummings as Atty. Gen. for Thelt. S a. 1/4/36. - P.S on Louis Trimble Jr., solicitor of Dept. Commerce for Daniel C. Roper 1/4/36. P.S. on Louis Trimble, Jr. solicitor for Department of Commerce of U. S. a. 1/4/36. - P.S. on James C. Peacock Director for Shipping Board Bureau Dept. Commerce of U. S. A. 1/4/36. - P.S on James C. Peacock individually as Director for Shipping Board of Dept. of Commerce of U. S. 1/4/36. - (Marsh. des Col.) -		
JAN	20	[illegible]	Order to show cause (not signed) + Memo. Ind: Caffey, J.		
JAN	27	1936	Filed Subpoena & Marshal's Return P. S. on Lamar Hardy individually 1/4/36. - P.S. on Lamar Hardy U. S. atty 1/4/36. -		
FEB	6	1936	Order designating N. B. Chase R. P. Patterson & W. Bondy as judges to hear this case Feb. 15-1936 at 10:30 a.m. Room 506 - Bondy, J.		
FEB	19	1936	Affdt. of Hans Lebrandsen		
APR	8	1936	" Opinion #9746 - Chase, C.J. Bondy + Patterson D. J.J.J. Bill dismissed		
APR	18	1936	" One (1) vol. of testimony		
MAY	22	1936	Final decree denying motion for interlocutory injunction; and dismissing complaint with costs to be taxed - Bondy, J., Patterson J.	U Id.	
MAY	22	1936	" Petition for appeal -		
MAY	22	1936	" Order allowing appeal - Cose, J.		
MAY	22	1936	" Assignment of errors -	A.P.W.G.R	5—
MAY	22	1936	" Citation Ret. 40 days — Cose, J.		
MAY	22	1936	" Praecipe on appeal -		
MAY	25	1936	" Undertaking on appeal - $250.00 U. S. Fid. + Guar. Co.		
"	27	"	" Bill of costs taxed by defts at $30.00		

[fol. 4]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. E-82/92

ISBRANDTSEN-MOLLER CO., INC., Complainant,

against

[THE UNITED STATES OF AMERICA, THE DEPARTMENT OF COMMERCE OF THE UNITED STATES, The Shipping Board Bureau of the Department of Commerce of the United States,] Daniel C. Roper, Individually and as Secretary of Commerce of the United States; James C. Peacock, Individually and as Director of the Shipping Bureau of the Department of Commerce of the United States, and Lamar Hardy, Individually and as United States Attorney for the Southern District of New York, Defendants.

BILL OF COMPLAINT—Filed January 3, 1936

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Your complainant, Isbrandtsen-Moller Co., Inc., for its bill of complaint and petition herein respectfully alleges as follows, that:

For Its First Cause of Action

1. Complainant, Isbrandtsen-Moller Co., Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York, having been incorporated for the purpose, among others, of operating steamships and carrying cargoes in foreign commerce between the United States and foreign countries. Complainant has [fol. 5] its principal office and principal operating office at No. 6 Broadway, in the City, County and Southern District of New York.

2. Defendant Department of Commerce of the United States is an Executive Department of the United States having its offices in the City of Washington, District of Columbia.

3. Defendant Shipping Board Bureau of the Department of Commerce of the United States is a Bureau of the Department of Commerce of the United States having its offices in the Department of Commerce Building in the City of Washington, District of Columbia.

4. Defendant Daniel C. Roper is the Secretary of Commerce of the United States and the head of the defendant Department of Commerce of the United States, and is an executive officer subject to the direction of the President of the United States, performing executive functions.

5. On information and belief, the defendant James C. Peacock is a resident of the City of Washington, District of Columbia, and is Director of the defendant Shipping Board Bureau of the Department of Commerce of the United States, and is Chairman of the Board of Trustees and President of the United States Merchant Fleet Corporation, and as such is a member of the Steamship Conferences or Shipping Combine.

6. Defendant Lamar Hardy, upon information and belief, is a citizen of the State of New York, residing in the City of New York in said State, and is the United States [fol. 6] Attorney for the Southern District of New York.

7. This is a suit in equity of a civil nature, arising under the Constitution and laws of the United States, as is hereinafter more fully set forth, and is a case of actual controversy, and is a suit brought in accordance with Section 31 of the Act of Congress of September 7, 1916, known as the Shipping Act, 1916 (46 U. S. C. §830), and Section 208 of the Judicial Code of the United States (28 U. S. C. §46), and the Act of Congress of October 22, 1913, Chapter 32 (28 U. S. C. §§43, 44, 45 and 47), to suspend, enjoin, set aside or annul an order issued on the 18th day of November, 1935, by the defendant Daniel C. Roper, Secretary of Commerce of the United States, purporting to act on behalf of the defendant Department of Commerce and the defendant Shipping Board Bureau of said Department, as alleged successor of the United States Shipping Board.

8. Suit is brought in this Court by reason of the provision of said Act of Congress of October 22, 1913, Chapter 32, that except in certain cases of which this suit is not one, venue of a suit brought to suspend or set aside

an order of the Interstate Commerce Commission (or an order of the United States Shipping Board by reason of Section 31 of the Shipping Act, 1916 [46 U. S. C. §830]) shall be in the Judicial District "where one of the petitioners in court has either its principal office or its principal operating office" (28 U. S. C. §43).

9. On the 18th day of November, 1935, defendant Daniel C. Roper, as Secretary of Commerce, purporting to exer- [fol. 7] cise the functions of the United States Shipping Board under Section 21 of the Shipping Act, 1916, issued an order reading in full as follows:

"Department of Commerce, Office of the Secretary,
Washington

In the Matter of Filing Rates and Charges by Common Carriers by Water in Foreign Commerce

Order

It appearing, That full and complete information as to the rates and charges for or in connection with the transportation of certain property from continental United States to points in foreign countries by carriers by water in foreign commerce subject to the Shipping Act, 1916, is necessary to the proper administration of the regulatory provisions of said act;

It appearing further, That Isbrandtsen-Moller Company, Inc., is a common carrier by water in foreign commerce subject to the Shipping Act, 1916;

It is ordered, In pursuance of the powers conferred by Section 21 of the Shipping Act, 1916, that Isbrandtsen-Moller Company, Inc., be, and it is hereby, notified and required to file with the Division of Regulation, United States Shipping Board Bureau, of this Department, at its office in Washington, D. C., on or before December 16, 1935, each port-to-port and tran-shipment rate charged and/or collected by it during the period from September 1, 1935, to November 12, 1935, both dates inclusive, for the transportation of property, except cargo loaded and carried in bulk without mark or count, from all points in continental United States of America to all points in foreign countries; indicated plainly as to each such rate, the place from and to which it was charged and/or collected, the effective

date thereof, and the name, in alphabetic order, of each commodity moving thereunder; showing also each terminal or other charge, privilege or facility, granted or allowed, and any rules or regulations which in anywise changed, affected, or determined any part of any such aforesaid rate, or the value of the service rendered to the consignor or consignee;

It is further ordered, That the aforesaid filing be in printed, typewritten, or mimeographed form, personally subscribed by an officer of said Isbrandtsen-Moller Com-
[fol. 8] pany, Inc., who shall specify his title and verify the accuracy and completeness thereof under oath;

It is further ordered, That copy of this order be served upon said Isbrandtsen-Moller Company, Inc.

(Sgd.) Daniel C. Roper, Secretary of Commerce.

November 18, 1935."

10. Thereafter and on the 7th day of December, 1935, the complainant addressed a communication to the defendant Roper as Secretary of Commerce setting out that the true purpose of said order of November 18, 1935, was to obtain information to be made available to complainant's competitors to aid them in their endeavor to drive the complainant out of business, and further setting out that the functions, powers and duties of the United States Shipping Board had never been validly transferred to the defendant Department of Commerce or to the defendant Roper as head of that Department. The complainant asked therefore that the time required for filing data under said order of November 18, 1935, be extended until the close of the next Session of Congress to give the Congress an opportunity to speak regarding the shipping situation, or that the defendant Roper agree that any information filed by the complainant prior to the close of the next Session of Congress should not be made public or disclosed to complainant's competitors, but should be used only for the information of the defendant Department of Commerce.

[fol. 9] 11. Thereafter and on the 16th day of December, 1935, a conference was held in the office of the Secretary of the Department of Commerce, in the City of Washington, in the course of which the complainant requested that said order of November 18, 1935, be withdrawn or that the complainant be assured that information filed there-

under would not be made available to complainant's competitors.

12. On the 18th day of December, 1935, the defendant Roper passed upon and denied the applications of the complainant for administrative relief as set out in paragraphs 10 and 11 above by a communication addressed to the complainant as follows:

"Department of Commerce, Office of the Secretary, Washington

December 18, 1935.

Isbrandtsen-Moller Company, Inc., 26 Broadway, New York, N. Y.

DEAR SIRS:

Reference is made to your letter of December 7, 1935 and to the conference held in this office on December 16, and in particular to your request that the Shipping Board Bureau Order of November 18, 1935, under Section 21 of the Shipping Act, 1916, be withdrawn or that you be assured that information filed thereunder will not be made available to the public.

This whole general subject was thoroughly considered in connection with the Shipping Board Bureau investigation under Section 19 of the Merchant Marine Act, 1920, and I do not find that anything presented in the letter or conference referred to above would justify a conclusion different from that which was then reached. Your request will therefore have to be denied.

Very sincerely, (Signed) Daniel C. Roper, Secretary of Commerce."

[fol. 10] 13. No further avenues of administrative relief are open to the complainant. If the relief prayed for herein is denied, the complainant will have no adequate remedy against the enforcement of said order of November 18, 1935, regardless of the invalidity, illegality and unconstitutionality thereof.

14. The defendants, other than the defendant Hardy, have claimed and asserted to complainant that there has been set up in the Department of Commerce a Bureau

known as the Shipping Board Bureau, and that this subordinate Bureau in an executive department is entitled to exercise the wide powers of control and the discretionary judgment originally committed to the United States Shipping Board of seven nationally representative Commissioners, who were specifically required by Congress to be appointed from different sections of the country, so as to insure proper geographical representation in formulating and regulating the American Shipping policy and in exercising certain regulatory and quasi-judicial powers, and the Commissioners of said Board once they were appointed were not removable by the President excepting for inefficiency, neglect of duty, or misconduct in office. Complainant is advised by its solicitors and believes, and therefore avers that the United States Shipping Board was obviously intended by Congress to be entirely independent of the President and of the various executive departments and to exercise semi-judicial powers like the Interstate Commerce Commission and the Federal Tariff Commission; and that Congress did not intend to authorize and, in fact, has not [fol. 11] authorized, an executive bureau such as the Shipping Board Bureau of the Department of Commerce to exercise discretionary powers over the American shipping industry.

15. The defendant Roper has never been lawfully authorized by any act of Congress, by the Constitution of the United States, or otherwise, to issue said order of November 18, 1935, either as Secretary of Commerce or in any other capacity. Though the defendants assert that said order is a lawful exercise of the regulatory provisions of the Shipping Act, 1916, the regulatory powers entrusted to the United States Shipping Board by said Shipping Act, 1916, have never been validly transferred to the defendants or any of them. Said order of November 18, 1935, was not issued and has never been approved or ratified by the United States Shipping Board as created and empowered by the Shipping Act, 1916, as amended. On information and belief the United States Shipping Board has made no effort to function as such since August 10, 1933, the effective date of Executive Order #6166, promulgated June 10, 1933, whereby the President of the United States without any warrant or authority in law purported to abolish

the United States Shipping Board, an independent body free from executive control.

16. Said order of November 18, 1935, is null and void and of no effect for the further reason that the regulatory powers entrusted to the Shipping Board by the Shipping Act, 1916, in the attempted exercise of which said order was [fol. 12] issued by the defendant Roper, could never be constitutionally exercised by an officer, board, bureau, agency, or department, of the executive branch of the Government by reason of the separation of legislative, judicial and executive powers provided and guaranteed by the Constitution of the United States.

17. On information and belief, the defendants purport to sustain the validity of said order of November 18, 1935, on the ground that the President of the United States did by Executive Order #6166 (5 U. S. C. § 132n.) promulgated June 10, 1933, and effective August 10, 1933, transfer the functions of the United States Shipping Board to the defendant Department of Commerce, pursuant to the authority vested in him by the Executive Department Reorganization Act of 1932 (5 U. S. C. §§ 124 et seq.). The complainant has been informed by its solicitors and verily believes and therefore avers that said Executive Order #6166 was ineffective to vest in the defendant Department of Commerce or in the defendant Roper the power to issue said order of November 18, 1935, for the following reasons, among others:

(a) Said Executive Department Reorganization Act of 1932 did not authorize the transfer of the regulatory or quasi-judicial functions of the United States Shipping Board to the defendant Department of Commerce or the defendant Roper.

(b) If said Executive Department Reorganization Act of 1932 had purported to authorize the transfer of the regulatory or quasi-judicial functions of the United States Ship- [fol. 13] ping Board to a purely executive department or a purely executive officer, such as the defendant Department of Commerce or the defendant Roper, it would be unconstitutional and void as violative of the provisions of the Constitution of the United States separating the powers of the legislative, judicial and executive branches of the Government.

(c) Said Executive Department Reorganization Act of 1932 is unconstitutional and void for the reason, among others, that it attempts to delegate legislative power to the President of the United States without furnishing any adequate declaration of policy or standard of action to guide him in carrying out the dictates of Congress, thereby violating Article I, Section 1 and Article I, Section 8, clause 18 of the Constitution of the United States of America.

(d) Said Executive Order #6166 was null and void and of no effect for the reason that said order was not preceded by and based upon adequate hearings and contained no adequate finding of facts and no adequate statement of the grounds justifying the President's action in issuing the order.

18. As has heretofore been set out, the complainant has exhausted its administrative remedy against the enforce- [fol. 14] ment of said illegal order of November 18, 1935. The sole legal remedy available to the complainant, viz., the defense of a suit brought against the complainant pursuant to the provisions of the Shipping Act, 1916, to enforce said order or to collect penalties for the complainant's failure to comply therewith, is grossly inadequate by reason of the fact that in the event that the validity of said order of November 18, 1935, should be ultimately sustained, complainant would be subjected to penalties in the amount of $100 per day for such period of time, however prolonged, as the defendants might delay in bringing suit and for such further period of time as might be required to defend the suit to a final conclusion. Injunctive relief against the enforcement of said order is the only plain, speedy and adequate remedy available to complainant and is essential to protect the complainant against irreparable damage.

19. Should the complainant attempt to prevent the running of penalties under Section 21 of the Shipping Act, 1916, (46 U. S. C. § 820) by complying with said order of November 18, 1935, the defendants would, on information and belief, disclose and reveal the information filed by the complainant to the complainant's competitors to the serious impairment and possible destruction of complainant's business. Should the complainant be required to run the risk of incurring the heavy penalty of $100 per day prescribed by Section 21 of the Shipping Act, 1916, during the

period required to prosecute this suit to a final hearing, the complainant is informed and verily believes that it would be deprived of that adequate remedy against the enforcement of an unconstitutional, arbitrary and oppressive order guaranteed it by the Due Process Clause of the Fifth [fol. 15] Amendment to the Constitution of the United States.

Wherefore, the complainant prays

(a) That process in due form issue out of and under the seal of this Court, directed to the defendants as required by law, and that due and proper service of such process and of this petition on the defendants, the United States of America, the Department of Commerce of the United States, and the Shipping Board Bureau of the Department of Commerce be forthwith made by filing a copy thereof in the office of the Secretary of Commerce of the United States, and another copy in the Department of Justice of the United States, pursuant to the provisions of Section 209 of the Judicial Code (28 U. S. C. § 45) and that, thereafter, the defendants and each of them, be required on or before a date to be specified in the subpœna or notice or process issued by this Court to appear herein and to answer this petition.

(b) That as soon as practicable this Court convene a special statutory court of three (3) judges as required by the Act of October 22, 1913, Chapter 32 (28 U. S. C. § 47), and that a preliminary injunction be entered herein restraining, enjoining and suspending the operation of said order of the Secretary of Commerce dated November 18, 1935, pending the final hearing and determination of this suit, pursuant to Section 208 of the Judicial Code (28 U. S. C. § 46).

(c) That on the final hearing of this cause the defendants and each of them, and each of their officers, agents, attorneys, and deputies, be permanently enjoined and restrained from enforcing or attempting to enforce said order [fol. 16] dated the 18th day of November, 1935, or in any manner attempting to collect penalties or impose any penalties upon the complainant or any of its officers for failure to comply with said order.

(d) That this Court declare that the said order dated the 18th day of November, 1935, is illegal, unconstitutional and void in the respects and for the reasons set forth in this bill of complaint and petition.

(e) And for such other and further relief as to justice and equity may pertain, and for its costs.

For Its Second Cause of Action

20. The allegations contained in paragraphs numbered 1 to 14, inclusive, 18 and 19 are repeated and realleged with the same force and effect as though here set out in full.

21. On information and belief, though said order of November 18, 1935, was signed by the defendant Roper, said defendant Roper had previously transferred, so far as lay within his power, all his functions and duties in connection with the subject matter of said order to the defendant James C. Peacock; and it was the defendant Peacock who, as Director of the Shipping Board Bureau of the Department of Commerce, purported at and prior to the date of issuance of said order, and ever since has purported, to exercise the functions committed to the United States Shipping Board by the Shipping Act, 1916, as amended.

22. The defendant Peacock was prior to November 18, 1935, and ever since has been Chairman of the Board of [fol. 17] Trustees and President of the United States Merchant Fleet Corporation, which is a private steamship corporation organized under the general corporation laws of the District of Columbia, and which owns or controls steamships which are operated in competition with the steamships of complainant and other steamship operators.

23. On information and belief, the defendant Peacock as President and Chairman of the Board of Trustees of the United States Merchant Fleet Corporation did on November 18, 1935, and ever since has controlled steamships whose operators are members of conferences or groups of steamship companies combined by contract together to fix rates and otherwise further a shipping monopoly solely for the selfish purpose of making greater profits for certain steamship companies, most of which are owned by aliens residing in foreign countries, and most of whose vessels are operated under the flags of foreign countries, and to eliminate

competition by any independent or non-conference steamship company such as complainant.

24. On information and belief, all of the stock of the said Merchant Fleet Corporation is owned by the defendants. Said Corporation did on November 18, 1935, and ever since has owned or controlled steamships operated in competition with complainant's vessels in the same trades, under the direction of the defendant Peacock.

25. The interests and purposes of said Merchant Fleet Corporation, and of the defendant Peacock as President and Chairman of the Board of Trustees of said corporation and as a member of the monopolistic shipping combines or conferences, and of the defendants who are stockholders of said corporation are wholly inconsistent with the proper and impartial exercise of the regulatory and quasi-judicial [fol. 18] functions granted by Congress to the United States Shipping Board, and with the interests of American shippers and exporters generally, and with the interests of independent steamship companies and competitors, and with the public interest of the United States as expressed in the Shipping Act, 1916, and elsewhere in the statutes and laws of Congress.

26. The provisions of the Constitution of the United States providing for a separation of powers between the legislative, judicial and executive branches of the Government and the Due Process Clause of the Fifth Amendment to the Constitution of the United States prohibit the exercise of regulatory or quasi-judicial functions such as were entrusted to the United States Shipping Board by the Shipping Act, 1916, by persons or agencies having the interests and purposes above set out, and therefore render null and void the said order of November 18, 1935.

Wherefore, the complainant prays for the same relief sought under its first cause of action as if the prayers for relief under said first cause of action were here set out in full.

For Its Third Cause of Action,

27. The allegations contained in paragraphs numbered 1 to 14 inclusive, 18 and 19 are repeated and realleged with the same force and effect as though here set out in full.

28. On information and belief, said order of November 18, 1935, was issued not for a public purpose authorized or designated by Congress, but to promote and foster a shipping monopoly of the complainant's competitors, the Conference Lines, which has as its avowed purpose the monopolization of all transportation in the foreign commerce of [fol. 19] the United States; and to promote and foster the use by complainant's competitors, the Conference Lines, of an illegal practice of quoting a rate to a shipper, and then agreeing to give a large rebate of a fixed sum of money from such rate to such shipper if he will agree not to ship any of his goods during the year or season on a vessel not a member of the Conference Lines or shipping monopoly.

29. On information and belief, said order of November 18, 1935, was issued pursuant to a concerted plan of the defendants to compel complainant and any other independent or non-conference carriers to become part of steamship conferences or the shipping monopoly or a contemplated unified system of transportation by all common carriers by water in the foreign commerce of the United States, and was issued at the request of certain of complainant's competitors to compel the complainant, which is an independent, unsubsidized, non-conference line, either to join a conference or shipping monopoly, which it could not lawfully be compelled to join, or else to suffer serious damage to, if not complete destruction of, its business from the disclosure to its competitors, members of said conferences or shipping monopoly, of its private business records and rates charged and commodities moved by it. The complainant is informed and verily believes and therefore alleges that any provision of law purporting to authorize the issuance of said order for said purposes would be a nullity, being violative of the provisions of the Fourth and Fifth Amendments to the Constitution of the United States.

Wherefore, the complainant prays for the same relief sought under its first cause of action as if the prayers for relief under said first cause of action were here set out in full.

For Its Fourth Cause of Action

30. The allegations contained in paragraphs numbered 1 [fol. 20] to 14, inclusive, 18 and 19 are repeated and re-

alleged with the same force and effect as though here set out in full.

31. Upon information and belief, said order of November 18, 1935, is an unjust discrimination against the complainant, contrary to the Due Process Clause of the Fifth Amendment to the Constitution of the United States, for the reason that it requires the complainant to file actual rates charged by it on particular goods between named ports, whereas the only order issued by the defendants to complainant's competitors, the said Conference Lines, requires merely the filing of general rate schedules which are not always adhered to, and which need not be adhered to under any law or government regulation. Moreover, the order of November 18, 1935, issued to the complainant was purportedly issued under Section 21 of the Shipping Act, 1916, violations of which section carry a heavy penalty; whereas the only order issued by the defendants to said competitors of the complainant was not issued under Section 21 or any other section of the Shipping Act, 1916, and carried no penalties for non-observance.

Wherefore, the complainant prays for the same relief sought under its first cause of action as if the prayers for relief under said first cause of action were here set out in full.

For Its Fifth Cause of Action

32. The allegations contained in paragraphs numbered 1 to 14, inclusive, 18 and 19 are repeated and realleged with [fol. 21] the same force and effect as though here set out in full.

33. The steps taken by the complainant in an effort to procure administrative relief against the enforcement of said order of November 18, 1935, were taken with the greatest possible dispatch after said order had come to the attention of the complainant.

34. Immediately upon receipt by the complainant on December 19, 1935, of the defendant Roper's letter of December 18, 1935, set out in full in paragraph 12 above, denying complainant's application for administrative relief, complainant sought the advice of counsel, whereupon the proceedings herein were instituted with the utmost speed consistent with the importance of the matters involved.

35. Complainant in its letter to the defendant Roper of December 7, 1935, offered to deliver to the defendants the data demanded in said order of November 18, 1935, on condition that said data be not revealed to the public or to complainant's competitors. Said order was flatly rejected by the defendant Roper as has been set out in paragraph 12 above.

36. The litigation herein is brought not for purposes of delay or because of any desire on the part of the complainant to obstruct the lawful performance of government functions but because the complainant in good faith believes that said order of November 18, 1935, is illegal, unconstitutional, null and void for the reasons set out above in complainant's first, second, third and fourth causes of action.

[fol. 22] 37. The disclosure of the data demanded by said order of November 18, 1935, to complainant's competitors would result in an immediate, serious injury to and possible destruction of complainant's business and in other irreparable injury to complainant. There is and has been no way in which the complainant could comply with said order and at the same time protect its equitable, legal and constitutional rights.

Wherefore, the complainant prays

(a) that the defendants and each of them, and each of their officers, agents, attorneys and deputies, be temporarily and permanently enjoined and restrained from collecting or imposing or in any manner attempting to collect or impose any penalty or penalties upon the complainant or any of its officers for failure to comply with said order of November 18, 1935, from the date of its issuance until the date of the final determination in these proceedings of the validity and enforcibility of said order;

(b) and for such other and further relief as to justice and equity may pertain and for its costs.

Isbrandtsen-Moller Co., Inc., by Hans J. Isbrandtsen, President. Davis, Polk, Wardwell, Gardiner & Reed, Solicitors for Complainant, by Theodore Kiendl, a Member of that Firm.

[fol. 23] *Duly sworn to by Hans J. Isbrandtsen. Jurat omitted in printing.*

[File endorsement omitted.]

[fols. 24-37] Summons and returns showing service on Homer S. Cummings et al. omitted in printing.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—January 3, 1936.

Upon reading and filing the bill of complaint and petition of Isbrandtsen-Moller Co., Inc., duly verified the 3rd day of January, 1936, and upon the affidavit of Hans Isbrandtsen, verified on the 3rd day of January, 1936, and other good cause appearing therefor,

Now on motion of Davis, Polk, Wardwell, Gardiner & Reed, solicitors for complainant Isbrandtsen-Moller Co., Inc., it is

Ordered that the defendants above named, and each of them, show cause, if any they have, at 10:30 o'clock A. M. on the 10th day of January, 1936, before the above entitled [fol. 39] court at a stated term thereof to be held in the Old Post Office Building, at Broadway and Park Row, Borough of Manhattan, City, County and State of New York, why an interlocutory injunction should not be issued against defendants restraining or suspending and setting aside the operation of the order issued on November 18, 1935, to complainant Isbrandtsen-Moller Co., Inc., by the defendant Daniel C. Roper, Secretary of Commerce, purportedly in pursuance of the powers conferred on the United States Shipping Board by Section 21 of the Shipping Act, 1916, which order was entitled "In the Matter of Filing Rates and Charges by Common carriers by Water in Foreign Commerce" and restraining the defendants, and each of them and each of their officers, agents, attorneys and deputies from in any manner attempting to collect penalties or impose any penalties upon the complainant or any of its officers for failure to comply with said order until the final decree of this court in this cause; and it is further

Ordered that a copy of this order be served on each of the defendants at least five days before the return date of this order to show cause as hereinbefore designated.

Francis G. Caffey.

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HANS ISBRANDTSEN

STATE OF NEW YORK,
County of New York, ss:

Hans Isbrandtsen, being duly sworn, deposes and says:

Deponent is the President of Isbrandtsen-Moller Co., Inc., the complainant named in the bill of complaint and petition filed in the above entitled cause.

Deponent has verified the said bill of complaint and petition and incorporates the allegations therein as part of this affidavit, the same as if herein set forth in full.

On the 18th day of November, 1935, defendant Daniel C. Roper, as Secretary of Commerce of the United States purporting to exercise the functions of the United States Shipping Board under Section 21 of the Shipping Act, [fols. 41 & 42] 1916, issued an order to complainant which is copied in full in paragraph 9 of said bill of complaint and petition. Deponent is advised by his solicitors that said order of November 18, 1935, is invalid on the various grounds and facts set forth in said bill of complaint and petition and that complainant should not properly be subjected to the severe penalties of $100 per day since the effective date of said order, namely, December 16, 1935, either under Section 21 of the Shipping Act, 1916, or otherwise. The enforcement of said order of November 18, 1935, and the collection of the said penalties of $100 per day for each and every day since its effective date, December 16, 1935, will cause serious injury to and possible destruction of complainant's business by divulging to complainant's competitors trade and rate data in connection with complainant's business and for other reasons set forth in said bill of complaint and petition and will cause irreparable injury to complainant.

Hans Isbrandtsen.

Sworn to before me this 3d day of January, 1936. Julius J. —— [illegible], Notary Public, Queens County. Queens Co. Clk's No. 1712, Reg. No. 845. N. Y. Co. Clk's No. 170, Reg. No. 6D83. Commission expires March 30, 1936.

[fol. 43] MEMO. ENDORSED ON ORDER TO SHOW CAUSE

"The matter not having been brought on further before me and in the meantime having been brought on before Judge Bondy in the motion part, I assume the application to me has been abandoned. I am therefore sending to the Clerk's office the papers submitted to me.

Francis G. Caffey, U. S. D. J.

January 18, 1936. Filed Jan. 20/36.

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR HEARING BEFORE THREE JUDGES—Filed February 6, 1936

On the order to show cause issued on January 3, 1936, filed herein, and on the affidavit of Hans Isbrandtsen, president of the complainant, verified January 3, 1936, annexed thereto and on file herein, and on reading and filing the bill of complaint and petition herein, and on hearing the application made before me on January 10, 1936, by solicitors for the complainant, that the question of whether a temporary and permanent injunction should issue herein as prayed for in said bill of complaint be heard and determined by a district court of three judges, as required by law, and notice having been given to the defendants and there being no opposition,

[fols. 45 & 46] Ordered that this cause and all the issues and all further proceedings herein, be heard and determined by three judges of whom at least one shall be a circuit judge as required by the Act of Congress of October 22, 1913, chapter 32 (28 U. S. C. § 47) and Section 31 of the Shipping Act, 1916 (46 U. S. C. § 830), as amended or qualified by the Act of Congress of June 30, 1932, chapter 314, as amended (5 U. S. C. § 124 et seq.) and Section 12 of Executive Order No. 6166 promulgated thereunder by the President of the United States on June 10, 1933, and I hereby call to my assistance for a hearing and determining of said cause Honorable Harrie B. Chase, United

States Circuit Judge for the Second Circuit, and Honorable Robert P. Patterson, United States District Judge for the Southern District of New York, and

Ordered that this cause be and hereby is set for hearing on the 15th day of February, 1936, at 10:30 a. m. in Room 506, new United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York.

Wm. Bondy, U. S. D. J.

Notice of settlement is hereby waived.

Lamar Hardy, U. S. Atty.

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF CROSS-MOTION TO DISMISS

SIRS:

Please Take Notice that upon the argument of your motion for an interlocutory injunction, the undersigned, appearing on behalf of the defendants The United States of America, Daniel C. Roper, individually and as Secretary of Commerce of the United States, and Lamar Hardy, individually and as United States Attorney for the Southern District of New York, will make a cross motion to dismiss the bill of complaint and petition herein as against the aforesaid defendants for failure to state facts sufficient to constitute a cause of action in equity and for such other [fol. 48] and further relief as may be just and proper.

Dated, New York, N. Y., January 21, 1936.

Yours, etc., Lamar Hardy, United States Attorney for the Southern District of New York, Solicitor for the Aforesaid Defendants, Office and Post Office Address: Foley Square, Borough of Manhattan, City of New York.

To Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Solicitors for Complainant, 15 Broad Street, New York, N. Y.

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

SPECIAL APPEARANCE AND NOTICE OF CROSS-MOTION TO DISMISS

SIRS:

Please Take Notice that upon the argument of your motion for an interlocutory injunction, and upon the annexed affidavit of John F. Davidson, verified the 21st day of January, 1936, the bill of complaint and petition filed herein, and the Marshal's return of service of the writs of subpœna, the undersigned appearing specially and for the sole purpose of this motion on behalf of the defendants The Department of Commerce of the United States, The Shipping Board Bureau of the Department of Commerce of the United States and James C. Peacock, individually and as Director of The Shipping Board Bureau of the Department of Commerce of the United States, will make a cross motion to quash the alleged service of subpœnas in [fol. 50] equity upon the said defendants, to vacate and set aside the returns of the United States Marshal upon the said writs of subpœnas and to dismiss the bill of complaint and petition herein as against the said defendants for want of proper jurisdiction and venue.

Dated, New York, N. Y., January 21, 1936.

Yours, etc., Lamar Hardy, United States Attorney for the Southern District of New York, Appearing Specially and for the Sole Purpose of this Motion on Behalf of the Above Named Defendants, Office and Post Office Address: New United States Court House, Foley Square, Borough of Manhattan, City of New York.

To Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Solicitors for Complainant, 15 Broad Street, New York, N. Y.

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN F. DAVIDSON

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

John F. Davidson, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York and as such am in charge of the above entitled suit.

2. I have examined the docket entries relating to the above entitled case in the office of the Clerk of the United States District Court for the Southern District of New York. It appears from such docket entries that the return of the United States Marshal for the District of Columbia was filed in the office of the Clerk of this District on January 7, 1936; and that such return shows that on January 4, 1936 copies of the subpœna and bill of complaint were [fol. 52] personally served in the District of Columbia on South Trimble, Jr., Solicitor for the Department of Commerce of the United States of America, James C. Peacock, Director for Shipping Board Bureau, Department of Commerce of the United States of America, and on James C. Peacock, individually and as Director for Shipping Board Bureau of the Department of Commerce of the United States of America. Although these subpœnas were issued out of this Court, no service has been made within the Southern District of New York upon The Department of Commerce of the United States, the Shipping Board Bureau of the Department of Commerce of the United States or James C. Peacock, individually and as Director of the Shipping Board Bureau of the Department of Commerce of the United States, the defendants appearing specially herein.

3. Furthermore, the said defendant James C. Peacock has his official residence in the City of Washington in the District of Columbia, and his personal residence in Chevy Chase, Maryland, and not in the Southern District of New York.

4. The reason this affidavit is made by me and not by the aforesaid defendants is because the said defendants are not present within the Southern District of New York.

5. The statements made herein are based upon information, memoranda and communications received in my official capacity from the Department of Commerce, and upon the records in the office of the Clerk of this Court.

Wherefore, it is respectfully prayed that the relief requested be granted since this Court has acquired no jurisdiction over the aforesaid defendants by virtue of the al-
[fol. 53] leged service of subpœnas upon them in the District of Columbia, and since, in view of the residences of the said defendants, this Court has no jurisdiction over any suit brought against any of the said defendants, nor is it in proper venue for such suit.

John F. Davidson.

Sworn to before me this 21st day of January, 1936. Armand Chankalian, Notary Public, New York Co. Clerk's No. 343 Reg. No. 7C494. Commission expires March 30, 1937.

[fol. 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HANS ISBRANDTSEN

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

Hans Isbrandtsen being first duly sworn, deposes and says:

He is the President of Isbrandtsen-Moller Co., Inc., the complainant in the above entitled suit.

He has verified the complaint in the above entitled suit and incorporates the allegations therein as part of this affidavit the same as if herein set forth in full.

He also incorporates the allegations in his affidavit filed herein dated January 3, 1936 as part of this affidavit the same as if herein set forth in full.

The facts and general position of complainant with respect to the order of November 18, 1935 of the defendant Daniel C. Roper, Secretary of Commerce, and with respect to the activities of that defendant's subordinates or bureaus with respect to complainant have been repeatedly set forth [fol. 55] by complainant and by deponent in the newspapers published generally in the Port of New York and the facts and statements contained in three such public statements made by complainant and by deponent in the newspapers of the Port of New York are incorporated herein as part of this affidavit the same as if herein set forth in full, and true and complete copies thereof are annexed hereto, marked respectively Exhibits A, B and C and made a part hereof.

Harry S. Brown, whose affidavit has been filed herein by defendants, has stated orally to deponent in the presence of witnesses that the demand for the rate information sought by the Shipping Board Bureau from complainant's files, in reality came only from two of complainant's competitors, namely the Black Diamond Line and the Dollar Line, both of whom are members of steamship conferences or combinations actively competing with complainant; and the said Harry S. Brown has further stated in writing that the purpose of the Shipping Board Bureau in investigating the rates and business of non-conference lines was to benefit the conference lines. Deponent has taken the advice of counsel and is informed and believes that Congress has never intended in the Shipping Act of 1916 or otherwise to require independent or non-conference steamship lines to join the so-called conference or shipping monopoly, Congress having intended to leave it as a purely voluntary matter whether or not a steamship line wished to join such a conference, but requiring that if it did join such a conference thereby violating the Sherman Anti-Trust Act, it would be required by Section 15 of the Shipping Act of 1916 to file its rates with the United States Shipping Board or otherwise be subjected to the penalties and prosecutions un- [fol. 56] der the Sherman Anti-Trust Act because of furthering a shipping monopoly.

Deponent has taken the advice of counsel and is informed and believes complainant has a legal right to carry on its business in United States waters as an independent or non-conference steamship line without being compelled by harassment, by a government bureau or otherwise, to join the

conference or shipping monopoly. Deponent believes that the only proper economical and sound method of carrying on the steamship business is to do as complainant has been doing, namely, keep apart from shipping monopolies or conferences and afford to American shippers and exporters such a reliable, regular and economical service as an unsubsidized and efficient steamship line can render so as to enable American goods to reach foreign ports and markets at economical cost of transportation and thereby effectually compete with foreign sellers sending goods competitively to such foreign markets for sale.

Deponent is informed and believes that such schedules of rates as have been filed by other carriers with the Shipping Board have been filed by carriers who are members of a conference or shipping monopoly and are required by Congress by Section 15 of the Shipping Act of 1916 to file such rates as a condition to not being prosecuted under the Sherman Anti-Trust Act. Deponent is informed and believes that Congress by the Shipping Act of 1916 intended that only common carriers in interstate commerce, as distinguished from foreign commerce, should be required to file their rates with the Shipping Board, as is evident from Section 19 of the Shipping Act of 1916. Deponent is in- [fol. 57] formed and believes that neither the Shipping Act of 1916 nor any other act of Congress requires such carriers as have filed their schedules of rates with the Shipping Board as members of a conference or shipping monopoly, to actually observe those rates, or has given the Shipping Board any power to compel them to do so, and deponent is informed and believes that in many instances such schedules of rates are in fact not observed by the conference lines or shipping monopoly, and that Harry S. Brown, whose affidavit has been filed by defendants herein, simply is not sufficiently familiar with the actual practices in the steamship business of said conference lines to make a statement of his own knowledge; and deponent is informed and believes that said Harry S. Brown is merely a subordinate in the Shipping Board Bureau in Washington, and resides and has his office in the City of Washington.

The Order of November 18, 1935 of the defendant Roper is in substance an effort by a competitor of complainant to regulate complainant's business and drive it from business as an independent or non-conference operator and compel

it to join the shipping monopoly or conference as is plainly evident from the affidavit filed herein by Samuel D. Schell, dated January 27, 1936, and from the affidavit of Harry S. Brown filed herein, dated January 25, 1936. The defendants Roper, Secretary of Commerce, and James C. Peacock are actively and directly competing with complainant in the same trades through exercising the functions of the United States Shipping Board Merchant Fleet Corporation (which deponent is informed was organized as a private corporation under the general laws of the District of Columbia for [fol. 58] the purpose of engaging in the steamship business for profit as an operator of merchant steamships), and instances of this appear from several written steamship operation agreements signed by said defendants, and a true and complete copy of one of which is annexed hereto, marked Exhibit D, and made a part hereof.

So far as the purpose of regulating or stabilizing rates is concerned, which is stated at the end of the affidavit of Samuel D. Schell, and which is also stated as the purpose of the Shipping Board Bureau at page 6 of the affidavit of Harry S. Brown filed herein, deponent has taken the advice of counsel and is informed and believes that neither the United States Shipping Board nor the Department of Commerce has ever been authorized by Congress to regulate or stabilize rates in the foreign commerce of the United States, the United States Shipping Board's authority in that respect being expressly restricted in the Shipping Act of 1916, Section 19, to requiring the filing of maximum rates in interstate commerce and being restricted by the inter-coastal act of June, 1933 to requiring the filing of schedules of rates in inter-coastal commerce. The affidavits of Samuel D. Schell and Harry D. Brown filed herein now disclose clearly and definitely that the Order of November 18, 1935 of defendant Roper is a palpable attempt to exercise a power of rate filing and regulation in the foreign commerce of the United States which Congress has repeatedly declined to confer on the United States Shipping Board or its alleged successor. Deponent is informed and believes that until the Order of November 18, 1935 was issued by the defendant Roper, no nation in the history of the world had ever before attempted to regulate freight [fol. 59] rates in foreign commerce from or to such nation, and it is obvious to anyone with experience in the steam-

ship business that such attempt at rate regulation in foreign commerce by one nation would be impossible in practice and would inevitably result in disruption of international shipping by counter rate regulation by each nation against the other.

Hans Isbrandtsen.

Sworn to before me this 18 day of February, 1936. Charles F. McElroy, Notary Public, Kings Co. Certificate filed in N. Y. Co. Kings County Clerk's No. 131. New York County Clerk's No. 143. Term expires March 30, 1937. (Seal.)

(Here follows three photos, side folios 60, 61 and 62)

EXHIBIT "A" TO AFFIDAVIT
REPRINTED FROM
The Journal of Commerce
NEW YORK
MONDAY, JUNE 25, 1934

To the Shipping Public:

The investigation which the Shipping Board has been conducting at the Hotel Commodore seems to have developed largely into a concerted attack upon this company by our competitors. As neither this company nor any of the ships we employ is the beneficiary of any government subsidies or mail contracts, we have neither time nor money to engage in this protracted controversy, which has already lasted for weeks and has involved the examination of a great number of witnesses in New Orleans and on the Pacific Coast as well as in New York. We, therefore, take this means of answering a few of the misleading statements which have been made about us, and advising our friends of the true facts.

Perhaps the most misleading feature of the testimony given at the Hotel Commodore was the effort to give the investigation a national or patriotic aspect. We have been referred to as a "Danish company" which operates with foreign chartered vessels. Incidentally, this company is a New York Corporation, but we mention this fact merely in passing, and do not consider it important. The important fact is that the Conference Lines who attack us are mostly foreign lines. In almost all of the Conferences a majority of the lines, both in number and tonnage, are foreign. This shows the absurdity of suggesting that there is any national interest in stabilizing freight rates at a high level. Such a course would merely place an additional burden on the foreign trade of this country for the benefit primarily of foreign shipowners. We desire to emphasize that the present investigation is not directed at competition between American and foreign shipowners; the differential in operating costs, owing to the higher living standards in this country, has already been dealt with by postal and other subventions designed to put the American shipowner on a parity with his foreign competitors. The present investigation has to do with the competition between the Conference Lines (largely foreign) and their few independent competitors.

The Conference Lines contend that this competition should be eliminated so that rates can be "stabilized." We recognize the need for stabilization from the standpoint of some of the Conference Lines, because only in this way can the American exporter be saddled with the cost of maintaining the great surplus of expensive tonnage which some of the Lines were unwise enough to build during a boom period, and which the acute world depression has rendered economically worthless. Whether the American export trade should assume the burden of this tonnage (including an enormous amount of foreign tonnage) will be for Congress to decide. It is an economic problem which we shall not discuss here. Within the space available to us we can only state briefly our own position, which we desire to bring to the attention of the friends and patrons of our Line throughout the United States:

1. We believe that a steamship line can only be operated permanently and successfully on the basis of careful, skillful, and economical management.
2. We believe the American shipper is entitled to the cheapest transportation which can be supplied on a sound economical basis. We do not believe that an American exporter of machinery, lumber or cotton should have to contribute to the cost of swimming pools and floating night-clubs in which he is not interested. On the contrary we believe that he should be given the continued opportunity of shipping at a low rate, on vessels which can be operated economically and cheaply.
3. We believe that the problem of surplus tonnage is a problem which rests with the shipowners who made the decision to invest in it, and not with the shipping public.
4. We believe that any shipping monopoly is objectionable; and we are confident that the American public will never tolerate a shipping monopoly largely dominated by foreign lines. Our competitors ask that competition be regulated; but it is clear from their testimony that what they really seek is to eliminate competition altogether.
5. If rates are "stabilized" it will mean that the shipping public must pay to all lines the rate at which the least efficient line can be operated; and must pay for the services of a slow vessel of the simplest freighter type a rate at which a competing line can afford to operate an elaborate and expensive ocean liner.
6. We receive no governmental aids or subventions of any character.
7. Our success is not based upon rate-cutting and we do not operate at a loss. We are able to operate profitably at low rates because of careful planning, conservative methods and efficient operation It has been our aim to meet the need for simple and economical service and not to force our customers to pay for an extravagant and expensive service which they do not require.

and foreign shipowners; the differential in operating costs, owing to the higher living standards in this country, has already been dealt with by postal and other subventions designed to put the American shipowner on a parity with his foreign competitors. The present investigation has to do with the competition between the Conference Lines (largely foreign) and their few independent competitors.

The Conference Lines contend that this competition should be eliminated so that rates can be "stabilized." We recognize the need for stabilization from the standpoint of some of the Conference Lines, because only in this way can the American exporter be saddled with the cost of maintaining the great surplus of expensive tonnage which some of the Lines were unwise enough to build during a boom period, and which the acute world depression has rendered economically worthless. Whether the American export trade should assume the burden of this tonnage (including an enormous amount of foreign tonnage) will be for Congress to decide. It is an economic problem which we shall not discuss here. Within the space available to us we can only state briefly our own position, which we desire to bring to the attention of the friends and patrons of our Line throughout the United States.

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6. We receive no governmental aids or subventions of any character.
7. Our success is not based upon rate-cutting and we do not operate at a loss. We are able to operate profitably at low rates because of careful planning, conservative methods and efficient operation It has been our aim to meet the need for simple and economical service and not to force our customers to pay for an extravagant and expensive service which they do not require.
8. We believe that the only solution of the current depression in the shipping business is an increase in international trade. To the extent of our ability we have tried to play our own small part in stimulating foreign trade and we believe that our customers will agree that we have worked with them in seeking out new markets and new channels of trade. We believe that the Conference Lines could employ their great influence to better effect in trying to increase trade rather than in trying to place additional burdens on the small volume of trade which still exists.
9. We believe that competition is still the life of trade. We do not claim the right of dictating to the shippers how they shall arrange their shipments, or the right to tell our competitors how they shall run their business. We concede them entire freedom of action and claim the same privilege ourselves.

Finally, we solicit inquiries in connection with our economical freight service conducted without frills or fancy equipment, and again call to the attention of the public that we cater particularly to the carrying of American goods which, for transportation reasons, or on account of competition of other exporting countries, have difficulties in finding markets abroad. This policy of ours has found particular favor in view of the unsettled and quick-changing commercial conditions the world over. We expect to continue this policy for the future as in the past.

Isbrandtsen-Moller Co., Inc.

17 BATTERY PLACE—NEW YORK

TO FAR EAST TO THE CONTINENT

WORLD WIDE CARRIERS OF FREIGHT

EXHIBIT "B" TO AFFIDAVIT

Repri ed From The Journal of Commerce New York,

Monday, December 28, 1935

To the Shipping Public:

This company has recently been the subject of considerable publicity by reason of our failure to comply with an alleged order of the Department of Commerce requiring us to report to that Department all rates charged and all commodities carried by our line. A brief statement of our position may be of interest to the public.

In 1916 Congress created the United States Shipping Board and gave it certain regulatory and quasi-judicial powers. The Board consisted of seven Commissioners who were specifically required to be appointed from different sections of the country so as to insure proper geographical representation. Once they were appointed, the Commissioners could not be removed by the President excepting for inefficiency or misconduct. The Board was obviously intended to be entirely independent of the President and of the various Executive Departments and to exercise semi-judicial powers like the Interstate Commerce Commission and the Federal Tariff Commission. By the Act of June 30, 1932, the President was given power to reorganize, consolidate or abolish various executive agencies and bureaus in the Executive Department. By an executive order issued on June 10, 1933, the President purported to transfer all the functions of the Shipping Board to the Department of Commerce which is one of the Executive Departments. There has been set up in the Department of Commerce a bureau known as the Shipping Board Bureau, and it is now claimed that this subordinate bureau in an executive department is entitled to exercise the wide powers of control and the discretionary judgment originally committed to the United States Shipping Board of seven nationally representative Commissioners. We do not believe that Congress ever intended to authorize, or in fact has authorized, an executive bureau to exercise discretionary powers over the American shipping industry.

Notwithstanding our conviction that the alleged order is invalid, we should not challenge it on merely technical grounds. We have nothing to conceal from the Shipping Board Bureau and we have offered to supply any data they desire for their own information. We asked only that the details of our business and of our customers' business should not be made available to our competitors, the Conference Lines. The Bureau has declined to accept this condition and has made it clear to us that they propose to give the Conference Lines the benefit of the data which we have been asked to file. Our competitors have been asked by the Board to file their general rate schedules, which seems proper since only by approval of the Board of their agreements, the Conference Lines escape prosecution under the provisions of the anti-trust laws. These general rate schedules of the Conference Lines are not always, and need not be, adhered to by them, whereas we are now ordered to file actual rates charged on particular goods between named ports.

In the North Atlantic trade and the Far East trade, the Conference Lines have almost a complete monopoly. If our company can be brought into line, the Conference Lines will be within sight of their goal, which is a 100% monopoly of American foreign freight service. From their standpoint the existence of an independent line which operates successfully without any aid from any government, is a constant threat and reproach. The Shipping Board Bureau has made no secret of the fact that it supports the Conference Lines and that its influence will be exerted in their favor. We do not question the motives of the Bureau; they are no doubt sincerely convinced that the Conference method of operation is beneficial to the country and that anything which hampers independent competition is commendable. We are not convinced, however, that this view is shared by Congress or by the people of the United States. To us, of course, it must seem strange that the Bureau should be so obviously concerned that independent steamship competition is available to American exporters, while at the same time so unconcerned over the outrageous misuse of huge sums of the taxpayers' money by certain American Conference Lines, with whom we compete, as unearthed in the recent congressional investigation. Highly inconsistent also, that the Conference contract system with its penalties, etc., in the foreign trade is not worthy of the Bureau's attention, but condemned by it in the intercoastal trade. So far as we are aware, no shipper has ever made any complaint of this Line or its methods. The attacks on us have come from our competitors, who constitute one of the greatest monopolies in the world, but who still find it necessary to invoke the aid of the United States Government in order to make sure that no independent ocean carrier can invade the waters of the United States.

It will of course be pointed out that this Line is operated with foreign flag vessels. In answer to that argument we will merely point out that the Conference Lines, both in number and tonnage, are predominantly foreign.

By an executive order issued on June 10, 1933, the President purported to transfer all the functions of the Shipping Board to the Department of Commerce which is one of the Executive Departments. There has been set up in the Department of Commerce a bureau known as the Shipping Board Bureau, and it is now claimed that this subordinate bureau in an executive department is entitled to exercise the wide powers of control and the discretionary judgment originally committed to the United States Shipping Board of seven nationally representative Commissioners. We do not believe that Congress ever intended to authorize, or in fact has authorized, an executive bureau to exercise discretionary powers over the American shipping industry.

Notwithstanding our conviction that the alleged order is invalid, we should not challenge it on merely technical grounds. We have nothing to conceal from the Shipping Board Bureau and we have offered to supply any data they desire for their own information. We asked only that the details of our business and of our customers' business should not be made available to our competitors, the Conference Lines. The Bureau has declined to accept this condition and has made it clear to us that they propose to give the Conference Lines the benefit of the data which we have been asked to file. Our competitors have been asked by the Board to file their general rate schedules, which seems proper since only by approval of the Board of their agreements, the Conference Lines escape prosecution under the provisions of the anti-trust laws. These general rate schedules of the Conference Lines are not always, and need not be, adhered to by them, whereas we are now ordered to file actual rates charged on particular goods between named ports.

In the North Atlantic trade and the Far East trade, the Conference Lines have almost a complete monopoly. If our company can be brought into line, the Conference Lines will be within sight of their goal, which is a 100% monopoly of American foreign freight service. From their standpoint the existence of an independent line which operates successfully without any aid from any government, is a constant threat and reproach. The Shipping Board Bureau has made no secret of the fact that it supports the Conference Lines and that its influence will be exerted in their favor. We do not question the motives of the Bureau; they are no doubt sincerely convinced that the Conference method of operation is beneficial to the country and that anything which hampers independent competition is commendable. We are not convinced, however, that this view is shared by Congress or by the people of the United States. To us, of course, it must seem strange that the Bureau should be so obviously concerned that independent steamship competition is available to American exporters, while at the same time so unconcerned over the outrageous misuse of huge sums of the taxpayers' money by certain American Conference Lines, with whom we compete, as unearthed in the recent congressional investigation. Highly inconsistent also, that the Conference contract system with its penalties, etc., in the foreign trade is not worthy of the Bureau's attention, but condemned by it in the intercoastal trade. So far as we are aware, no shipper has ever made any complaint of this Line or its methods. The attacks on us have come from our competitors, who constitute one of the greatest monopolies in the world, but who still find it necessary to invoke the aid of the United States Government in order to make sure that no independent ocean carrier can invade the waters of the United States.

It will of course be pointed out that this Line is operated with foreign flag vessels. In answer to that argument we will merely point out that the Conference Lines, both in number and tonnage, are predominantly foreign. It is difficult to understand why the powers of the United States Government should be exerted to foster a monopoly which is predominantly foreign and which has as its avowed purpose to monopolize transportation of American foreign commerce. In this connection thoughtful exporters will no doubt bear in mind that many of the foreign steamship companies which operate a service from this country also operate a service to the same foreign markets from their own country. This is a matter which has to be carefully considered before we disclose the details of our own business,—and incidentally the business of our customers, especially in view of the fact that such information is not required to be, nor is made public, or even filed, in any other exporting country competing with American export trade. It is true that we use foreign ships but we are an American company, and we have no other interests excepting in American foreign commerce.

We feel that we have been fighting for a principle which is important to all Americans who have an interest in the foreign commerce of this country. It may be that we are old fashioned and that it is against modern public policy for any concern to succeed by mere industry, economy and efficiency, without any subsidy from the taxpayers. However, we are not yet convinced that this is so. Under these circumstances we believe that American shippers and consignees are entitled to economical and competitive service, and we think they demand that privilege. As for us, we continue to cater to that demand.

Isbrandtsen-Moller Co., Inc.

26 BROADWAY — NEW YORK

TO FAR EAST TO THE CONTINENT

WORLD WIDE CARRIERS OF FREIGHT

OUR POSITION IS:

The Shipping Board Bureau's general attitude, as demonstrated on numerous occasions, is not in accord with the functions of the Department of Commerce. The functions of the Department of Commerce are to promote foreign commerce and to maintain an open international market, by the free and unobstructed movement of goods at economical transportation cost. Further, the Bureau's attitude seems influenced too much by the selfish interest of the steamship combinations to which our competitors in the steamship trade belong and very likely also by the Bureau's own interest in the operation of its ships in combination with others.

Also, we see no reason why we should be required to disclose our private trade information to our competitors (although we were not unwilling that the Department should have it for its own information if it would agree to accept it on that condition); but our reluctance to throw open to the world at large trade data that many of our customers reasonably expect be kept private, certainly is understandable. We take no part in monopoly or combination with others, or what might border thereon. We simply render an honorable, economical transportation service to those exporters and importers who want it, and without coercion of any sort.

The reason why most of our competitors are required to comply with various regulations and restrictions is because Congress, under pain of penalties under the Sherman Anti-Trust Act, forbade their combining together as conferences or shipping monopolies in restraint of competition unless they would agree to certain regulation. The benefits and special privileges they thus obtained at the expense of American shippers were apparently sufficient to persuade them to submit to regulation so as to be permitted to ignore the Anti-Trust Law without fear of prosecution for penalties. Congress made it plain, however, that compulsion was not properly to be used, either by such combining steamship companies or by the Shipping Board, to force an independent steamship company to join such a combination or to observe the practices of combinations or their fixed or frozen rates.

So the fundamental question is whether such maintenance of an open market as we favor, and such rendering of independent steamship service as we render, are to be harassed by a Bureau? If they are, we would like to know it definitely and, of course, must have it from good authority. Our understanding is that up to this time American national shipping policy has always been formulated by Congress or a regulatory and quasi-judicial body, and not by a Bureau head. And that policy heretofore has followed the overwhelming national interest in maintaining the rights of American exporters and shippers generally to have access to the world freight market by maintaining the principle of free competition in transportation service in the foreign trade. Obviously it is only by such a policy that American exporters can succeed in selling and delivering their products in foreign markets in competition with sellers or factories in foreign countries. As is known, our opposition to the rulings of the Bureau has brought with it a questioning of the legal authority of the one man dominating the Bureau to function as a regulatory or quasi-judicial body like the former Shipping Board Commission, a question that was raised by others before we raised it, so there was nothing new about it. The question of who's who would not, of course, be significant to us if true principles of trade and competition were adhered to. But if the latter are stifled, the life is out of business, and we are convinced that the ultimate authority deciding this question will not ignore plain common sense.

We are not interested in controversy, and it is a puzzle to us that the ordinary and every-day position we have taken right along should create such a maze of bureaucratic rulings, and such a wholly unnecessary situation.

Isbrandtsen-Moller Co., Inc.

26 BROADWAY—NEW YORK

TO FAR EAST TO THE CONTINENT

WORLD WIDE CARRIERS OF FREIGHT

Reprinted from
MARINE PROGRESS
February Issue, 1936

[fol. 63] EXHIBIT "D" TO AFFIDAVIT

Operating Agreement, 1935

This Agreement made on the 4th day of October, 1935, between the United States of America, hereinafter designated as the Owner, represented by the Secretary of Commerce, acting by and through the United States Shipping Board Merchant Fleet Corporation, and Cosmopolitan Shipping Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of Delaware, hereinafter designated as the Managing Agent,

Witnesseth:

1. Appointment of Managing Agent.—The Owner hereby appoints the Cosmopolitan Shipping Company, Inc., as its Managing Agent to manage, operate and conduct for and on behalf of the Owner, the business of the Owner's Line, known as the America France Line, operating on berth service between United States Atlantic ports, north of Cape Hatteras (with privilege of calling at Halifax and/or St. John, N. B.), and French Atlantic and French Channel ports, and shall allocate the following vessels:

Collamer
Independence Hall
Pipestone County
Sarcoxie
Schodack

and/or such other vessels as may hereafter be substituted for or added to the said vessels from time to time. The Owner may withdraw at any time from the Managing Agent any vessel or vessels now or hereafter allocated, which in its judgment are not required for the operation of the Line.

2. Acceptance of Appointment.—The Managing Agent hereby accepts said appointment and agrees to act as such Managing Agent and to manage and operate the said vessels and conduct the business of said Line under the authority hereby conferred by the Owner and subject to the terms and conditions herein set forth, and the directions, orders and regulations issued hereunder.

[fol. 64] 3. Managing Agent Must Use Care.—The Managing Agent shall exercise due diligence to protect and safeguard the interests of the Owner in all respects, and to avoid loss and damage of every nature to the Owner.

4. Delivery of Vessels.—The Owner hereby agrees to deliver all vessels under this contract classes A-1 (E) in the American Bureau of Shipping, with proper certificates, and to use due diligence that such vessels at time of delivery shall be seaworthy in every respect.

5. Managing Agent to Man, Supply and Operate.—The Managing Agent further agrees fully to man, equip, victual, supply and operate such vessels, subject to such restrictions and in such manner as the Owner may prescribe, and to certify or approve for payment by the Owner the true cost thereof and all other costs and expenses, except overhead, incident to the management, operations and conduct of business of such vessels as the Owner may from time to time direct. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner, and the Owner shall have the right to require the removal of any of such employees if it shall have reason to be dissatisfied. The vessels shall be manned by crews, obtained so far as practical through the Shipping Service of the Department of Commerce.

6. Maintenance and Repairs.—The Managing Agent shall, subject to such regulation or methods of supervision and inspection as may be required or prescribed by the Owner, exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair covering hull, machinery, boilers, tackle, apparel, furniture, equipment and spare parts, and to effect maintenance and voyage repairs and replacements. No extraordinary repairs or expenses of any kind shall be made by the Managing Agent, except in cases of serious emergency, without first securing in writing the authorization of the Owner.

7. Surveys.—The Owner shall have the right at any time, [fol. 65] without notice, to survey any of the vessels allocated to the Managing Agent, to satisfy itself that they are being properly maintained, and the Managing Agent shall make all such repairs as such survey may determine to be necessary.

8. Control by the Managing Agent.—The Managing Agent shall, as directed by the Owner, collect all monies and shall certify or approve for payment by the Owner, vouchers covering all expenses incident to the management and operation of the Line, the maintenance and operation

of the vessels, and all other business activities pertaining thereto. The Managing Agent shall account to the Owner for all monies collected by it or its subagents or monies disbursed by its subagents.

All business shall be carried on in the name of the said Line, for the account of the Owner.

The Managing Agent shall be responsible to the Owner in all respects for the acts of any agents selected by it, and such agents shall not be in any respect the agents of the Owner, but solely the agents of the said Managing Agent, and shall at any time be subject to disapproval by the Owner. The commission or fees payable to such agents shall be subject to approval by the Owner.

9. Traffic Contracts.—All traffic contracts shall be for the account of the Owner and all documents such as bills of lading, contracts of affreightment, etc., shall be in accordance with the terms, conditions and forms prescribed by the Owner.

10. General Average.—In case of general average, the Managing Agent agrees to appoint an adjuster from the list of adjusters approved by the Owner, and to assist the adjuster in preparing the average account, to take proper security for the cargo's proportion of average, and to assert liens and to take all other possible measures to protect the interests of the vessel and Owner. For such serv-[fol. 66] ices the Managing Agent shall receive the customary fee the amount of which will be determined jointly by the Managing Agent and the adjuster, subject to the approval of the Owner.

11. Accounting and Auditing.—The Managing Agent shall keep separate books of accounts, vouchers and documents in which will be recorded all transactions of every nature covering the operation of the Line, which books, vouchers and documents shall be maintained as prescribed by the Owner and shall be the property of the Owner.

The Corporate Books of the Managing Agent shall be fully and completely maintained, and these books of accounts, together with all vouchers, files and documents, shall be made accessible for examination and audit by representatives of the Owner upon demand. The books and records of foreign and domestic agencies in which the Managing Agent or its officials have financial interests,

together with the books and records of subsidiaries, affiliates, or associates that perform services or furnish supplies for the Line, shall so far as possible be made accessible to the Owner to the extent of determining the profits made from transactions with the Line.

12. Reports.—The Managing Agent shall furnish statements and reports when called for by the Owner and in the form prescribed by the Owner.

13. Insurance.—The Owner shall provide, without cost or expense to the Managing Agent, hull, machinery and port risk insurance and the Managing Agent shall provide, for the account of and subject to the approval of the Owner, — and I. and such other forms of insurance as the Owner may deem necessary.

14. Compensation.—In consideration of the services rendered by the Managing Agent, the Owner hereby agrees to pay said Managing Agent as follows:

(a) The sum of $11,250.00 per calendar month, and pro rata per fraction thereof for overhead provided however, [fol. 67] that for the period beginning with the date on which the first vessel is delivered to the Managing Agent under this agreement and ending with the date on which the last vessel is redelivered to the Owner under that certain agreement known as "Operating Agreement 1930", the payment to the Managing Agent for overhead shall be an amount for each calendar month or fraction thereof as will equal the same percentage ratio of the sum of $11,250.00 as the total vessel days per month under this agreement bears to the total vessel days in the same month under both this agreement and the "Operating Agreement 1930" as amended. Said sum shall be payable on the last day of each month commencing with the month during which the first vessel is delivered to the Managing Agent hereunder;

(b) A sum equivalent to three per cent (3%) of all the gross revenue, as herein defined earned by the Line and collected by the Managing Agent. Said sum shall be payable on the first day of the month on such gross revenue earned by the Line and collected during the preceding month;

(c) A sum equivalent to twenty-five per cent (25%) of the net profits earned by the Line during the period of this agreement or any extension hereof computed as hereinafter provided. Net profits earned by the Line for the period commencing with the effective date of this agreement and ending June 30, 1936, shall be computed for such period unless this agreement is terminated prior thereto, in which event the computation shall be as of date of termination. Net profits earned by the Line during any period of this agreement, or any extension hereof, subsequent to June 30, 1936, shall be computed as of June 30th of each year, or as of date of termination of this agreement or any extension hereof, whichever shall first occur. Said sum or sums shall be payable within thirty (30) days after the Owner computes the net profits earned by the Line for the periods herein set forth.

Net profit shall be computed on terminated voyages and is defined as excess of gross revenues over operating costs. Gross revenues include all revenue from cargo, passengers, mails, salvage and general average fees, dead freight net gain or loss on prepaid-beyond and advance transactions, net receipts or contributions under pooling agreements, and net agency fees received from other Managing Agents of the Owner. Operating costs include agency fees paid, commissions and brokerage, P. and I. insurance premiums, maintenance repairs not exceeding an aggregate amount per year or fraction thereof computed at the rate of Fifteen Hundred Dollars ($1,500.00) per voyage, uncollected revenues or insurance claims or other recoverable expenditures, net gain or loss on slop chest sales, net exchange [fol. 68] gains or losses, cash and trade discount credits, and all other usual costs and miscellaneous gains or losses in the operation of vessels, except marine insurance premiums, maintenance repairs in excess of the aforesaid amount, betterments, depreciation, interest, Managing Agent's commission on gross revenue, overhead payments to Managing Agent, and inactive vessel expense of vessels in lay-up, idle status and/or repaid status, for that part of any continuous period during which such status exists in excess of sixty (60) days.

If at any time after the date of this agreement, the compensation to the Managing Agent, by reason of changed

conditions or for any other cause, should appear to the Owner to be unjust either to the Owner or to the Managing Agent, it shall be subject to readjustment after consultation between the parties, and the decision of the Owner shall be final.

15. Contracts with Affiliated Companies.—The Managing Agent, as representative of the Owner, shall not trade with any individual, firm or corporation in which it or any of its officials, directors or employees may have an interest, without first obtaining the written approval of the Owner, and then only on the terms specified in such approval.

16. Termination of Agreement.—

(a) Cancellation by Owner.—In the event that the Managing Agent shall fail to perform its obligations under this agreement in a manner satisfactory to the Owner, the Owner shall have the right at any time to terminate this agreement forthwith as to any and all vessels assigned to the Managing Agent, or the Owner may at any time, upon giving the Managing Agent sixty (60) days notice in writing, terminate this agreement to become effective at the expiration of said sixty (60) days or, at the option of the Owner, as to any vessel upon its arrival and discharge at a United States port thereafter.

[fol. 69] (b) Cancellation by Managing Agent.—Upon giving the Owner sixty (60) days written notice, the Managing Agent shall have the right to terminate this agreement, such termination not to become effective as to any vessel until its arrival, discharge and redelivery at a port to be designated by the Owner.

(c) Liquidation of Business.—In case of termination under either (a) or (b), or upon expiration of this agreement, all vessels and other property of whatsoever kind then in possession or control of the Managing Agent by reason of this agreement shall be immediately turned over to the Owner at times and places to be fixed by the Owner, and the Owner may collect directly, or by such agent as it may appoint, all freight moneys or other debts remaining unpaid, provided, however, the Managing Agent shall, if required by the Owner, adjust, settle and liquidate the current business of the vessels. The expense of liquidation shall be for the account of the Managing Agent.

(d). Duration of Agreement.—Unless sooner terminated by cancellation as provided herein, this agreement shall be for the period of one (1) year, provided, however, that nothing herein contained shall bind the Owner in any fiscal year for the future payment of money in excess of appropriations made by Congress for that fiscal year.

17. Bond.—Before this agreement becomes operative, the Managing Agent agrees that it will furnish and maintain during the period of this agreement at its own expense a bond with sufficient corporate surety, in the amount of Fifty Thousand Dollars ($50,000.00), such bond to be approved by the Owner both as to form and sufficiency of surety, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the Managing Agent contained in this agreement, including without limitation of the foregoing the condition to faithfully account to the owner for all funds or property [fol. 70] received by the Managing Agent, its subagents, master and other licensed officers of vessels allocated hereunder, and for funds disbursed by its subagents and by the Owner upon approval for the Managing Agent. The Managing Agent may, in lieu of furnishing such bond, pledge U. S. Government securities, $50,000.00 face value, under an agreement satisfactory in form to the Owner.

18. Trade Name.—The trade name under which a line or route is operated with vessels of the Owner shall be subject to the approval of the Owner, and shall not contain the name of the Managing Agent, and such trade name shall remain the property of the Owner.

19. Foreign Flag Vessels—Competition.—The Managing Agent shall not be permitted to operate either as agent, owner, or charterer foreign flag vessels competing with vessels documented under the laws of the United States, and/or operate any vessels in competition with vessels allocated to the Managing Agent hereunder.

20. Salvage.—Salvage claims for services rendered to vessels other than vessels owned or controlled by the Owner shall be handled by, and be under the control of, the Owner. Salvage awards for services rendered to other

vessels owned or controlled by the Owner, including other vessels of this Line, shall be made by the Owner.

21. Beneficiaries.—No member of or delegate to Congress, nor Resident Commissioner, is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, except as provided in Section 116 of the Act of Congress approved March 4, 1909, (35 Stats. 1109).

22. Effective Date of Agreement.—This agreement shall become effective upon delivery of the first vessel by the Owner to the Managing Agent as herein provided.

23. Interpretation of Agreement.—Any question arising under the agreement shall be referred to the President of the Merchant Fleet Corporation for determination, and his decision shall be final.

[fol. 71] In Witness Whereof, the parties hereto have executed this agreement in triplicate as of the day and year first above written.

United States of America, by Secretary of Commerce, by United States Shipping Board Merchant Fleet Corporation, by J. C. Peacock, President. (Seal.)

Attest: S. D. Schell, Secretary.

Cosmopolitan Shipping Company, Inc., by A. F. Mack, President. (Seal.)

Attest: Lon Hudson, Asst. Secretary.

Office of the Solicitor of the Department of Commerce. Examined and found to comply with all the requirements of law and to be correct in form.

J. J. O'Hara, Acting Solicitor.

WHS.

Proofed with the Original Duplicating Section. W/G.

[fol. 72] [Endorsed:] Copy received 2/19/36. Lamar Hardy, U. S. Atty.

[fol. 73] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT ON BEHALF OF DEFENDANTS UNITED STATES OF AMERICA, DANIEL C. ROPER, SECRETARY OF COMMERCE OF THE UNITED STATES, and LAMAR HARDY, UNITED STATES ATTORNEY

DISTRICT OF COLUMBIA, SS:

Harry S. Brown, being duly sworn, deposes and says: Deponent is Chief of Division of Regulation of the United States Shipping Board Bureau, Department of Commerce; in that capacity he is in charge of and has immediate control over the records of the Division and direct supervision, under the Secretary of Commerce, of administering certain provisions of the Shipping Act, 1916 (46 U. S. C. 801, et seq.), and of the Merchant Marine Act, 1920 (46 U. S. C. 861, et seq.)

[fol. 74] Section 21 of said Shipping Act, 1916, in part is as follows:

"That the Board may require any common carrier by water, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default."

That the Secretary of Commerce is by the said Act and the Executive Order of the President of June 10, 1933, charged with the duty to see to it that no common carrier by water violates the Act by making or giving any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect

whatsoever, or subjects any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever (see sec. 16 of said Act), and that no common carrier by water in foreign commerce shall demand, charge or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors (see sec. 17), and whenever the Secretary of Commerce finds that any such rate, fare, or charge is demanded, charged or collected, he may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

The Secretary of Commerce is also charged with the duty of investigating the relative cost, advantages and disadvantages of operating in the foreign trade vessels under [fol. 75] United States registry and under foreign registry (see sec. 12 of said Act). In addition, he is under a duty to sell as soon as possible all of the merchant vessels owned by the United States, and, in order to accomplish this purpose, is specifically charged with keeping himself informed as to the sale price of vessels in the domestic and foreign market, the available supply of vessels and the demand for the same, existing freight rates and prospects of their maintenance (see sec. 5 of the Merchant Marine Act, 1920). In order to carry out the purposes of the said Acts and to perform the many functions and duties placed upon the Secretary of Commerce, he has found it necessary to require the submission to him by common carriers by water engaged in foreign commerce of schedules of rates and charges actually made for the transportation of property. Inasmuch as under the provisions of the law shippers and localities are given a specific interest in determining whether any undue preference or advantage is being granted any shipper or locality to the disadvantage of some other shipper or locality, it has been incumbent upon the Secretary of Commerce to make all such information as gathered by him concerning rates and charges public.

The complainant, Isbrandtsen-Moller Co., Inc., has persisted in refusing to file with the Secretary of Commerce its schedule of charges and rates made by it in connection

with the transportation of property in foreign commerce, except on the understanding that the information will be kept confidential and not be made public or divulged to any of the parties sought to be protected under the provisions of said Acts.

The Secretary of Commerce issued his order of November 18, 1935, which is the subject of the present dispute, only after failing to persuade that Company to file its regular rates. The said order of the Secretary of Commerce of November 18, 1935, was issued pursuant to the provisions [fol. 76] of Section 21 of the Shipping Act, 1916, heretofore quoted, and was for the purpose of carrying out the provisions of the aforesaid Acts.

Complainant, Isbrandtsen-Moller Co., Inc., is the only known carrier by water engaged in foreign commerce which has refused to file its schedules of rates and charges. All schedules of rates and charges filed by other carriers, whether using vessels flying the American flag, or foreign flag, whether using American-owned or foreign-owned vessels, whether members of conference agreements or not, are, at the present time, given full publicity and are, therefore, open to the complainant, Isbrandtsen-Moller Co., Inc.

The information contained in the schedule of rates filed by all other common carriers engaged in foreign commerce using ports of the United States includes the charges which said common carriers make for the transportation of different classifications of freight from ports in the United States to the ports in foreign countries covered by the respective common carriers and include also all rules and regulations of said common carriers which in any way affect such rates and charges. The rates and charges so filed by said common carriers indicate not only those which are charged as so-called regular rates and charges but also any special charges or rates which result from particular contracts which the respective common carrier may have with particular shippers and which are thereby different from the regular rates or charges. The rates and schedules so filed were those which were effective September 1st, 1935 and were to remain effective until changes were made therein by the respective common carriers, and the respective common carriers, upon making any changes in said schedules, within thirty days of the effectiveness of any such change, are filing notice of the said change with the

Secretary of Commerce. Many of said common carriers are not waiting for the lapse of the thirty day period before [fol. 77] filing notices of changes in the regular schedule, but are either giving notice of said changes before they become effective or are giving notices shortly after the same become effective.

The filing of the said schedules by the said common carriers has in every instance been made under oath, declaring that the rates and charges, rules and regulations so filed are the rates and charges, rules and regulations which have actually been observed by said common carriers. The filing of the said schedules by the said common carriers is the principal means by which it can be ascertained if the said common carriers are maintaining regular schedules of rates and charges which are applicable to all shippers alike. One of the purposes sought to be accomplished by the issuing to the complainant of the order in question, which only required it to file the charges it had made for the period from September 1, 1935 to November 12, 1935, was to determine whether or not the complainant was in fact maintaining a schedule of rates which were applicable on equal terms to all shippers or whether the complainant was charging different rates to different shippers for transportation of the same classification of freight. The complainant was not ordered under the terms of said order to disclose the name or business of any particular shipper, and had the complainant filed with the Secretary of Commerce the name of any particular shipper of any particular item of freight, the information would have been returned to the complainant as improperly filed and as disclosing the private business of the said shipper.

By reason of the fact that all other common carriers engaged in foreign commerce by water have filed all the necessary information by filing their schedules of rates, there has been no necessity to issue an order to them under Section 21 of said Shipping Act, 1916.

Under Section 15 of the Shipping Act, 1916 (46 U. S. C., sec. 814), Congress recognized the propriety of common [fol. 78] carriers by water combining together for the purpose of stabilizing rates and other practices and excepted such combinations from the provisions of the law commonly known as the Sherman Anti-trust Act and the Clayton Act, providing that the contracts, agreements and other

memoranda creating such combinations were kept on file with the Government and were approved by the Government. The Secretary of Commerce is given authority to approve, disapprove, cancel or modify any such agreements, and such agreements are scrutinized to determine whether they are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters of the United States and their foreign competitors or operate to the detriment of the commerce of the United States, and, if he finds that said agreements do not infringe in any of the ways mentioned, the Act provides that the Secretary of Commerce shall approve said agreements.

The experience of the Government has been that the existence of the conference agreements results in greater stabilization of rates and practices affecting foreign commerce and that shippers are greatly aided thereby in being able to quote prices for future delivery by reason of knowing what the freight rates will probably be in the future. With respect to many of the agreements, carriers engaged in the particular route covered by a conference agreement have been given the privilege of participating in contracts which have been signed by the members of the conference with particular shippers regarding rates, in return for an undertaking that such carriers will comply with the rates, rules and regulations of the conference, even though not becoming members.

The only purpose which the Secretary of Commerce has in scrutinizing the said conference agreements is to see that they do not violate the Act in any of the methods outlined above and to determine whether or not they actually result [fol. 79] in a monopoly which prevents any other carriers from engaging in business over the particular route covered by the conference and thereby result in undue and discriminatory rates to the detriment of shippers and the United States commerce.

While there are many foreign shipping companies and American shipping companies owning or operating foreign flag ships who are members of the conferences, the sailings of vessels flying the United States flag are in the majority of the conferences so numerous as to compare favorably with those of any other particular nation. The control by the Government of the conferences in which there are no

members who are citizens of the United States using vessels flying the United States flag has been most advantageous to the exporters and importers of the United States and has been one of the most potent methods of preventing rate wars which almost always result ultimately in excessive freight rates.

I have been informed and believe it to be the fact that Isbrandtsen-Moller Co., Inc., the complainant, is controlled by citizens of Denmark and that the president of the company is not a citizen of the United States but is an alien. All of the vessels which are operated by said company fly the flags of foreign countries.

No data concerning the failure of complainant to comply with the said order of the Secretary of Commerce of November 18, 1835, has been forwarded to the Attorney General either for the purpose of securing a mandatory order of a court to compel compliance or to enforce the collection of the amount forfeited under the provisions of said section of the Act.

[(Sgd.) Harry S. Brown.*]

Subscribed and sworn to before me this — day of January, 1936. —— ——, Notary Public. My commission expires —— —, ——.

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT ON BEHALF OF DEFENDANTS UNITED STATES OF AMERICA, DANIEL C. ROPER, SECRETARY OF COMMERCE OF THE UNITED STATES, AND LAMAR HARDY, UNITED STATES ATTORNEY—Filed June 1, 1936

DISTRICT OF COLUMBIA, ss:

Samuel D. Schell, being duly sworn, deposes and says:

Deponent is Assistant to Director of the United States Shipping Board Bureau of the Department of Commerce and is Vice President and Secretary of the United States Shipping Board Merchant Fleet Corporation and, as Secretary, is in charge of and has immediate control over the stock books and records of the said corporation. All of

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[* Signature in brackets, struck out in copy.]

the stock, with the exception of the necessary qualifying shares held by the Trustees of said Corporation, is owned by the United States of America. The said corporation has at no time conducted or engaged in and at the present time [fol. 81] does not conduct or engage in any private business on its own account.

Since the passage of the Merchant Marine Act, 1920 (46 U. S. C., 861, et seq.) all of the duties and business carried on by the said corporation have been those which have been delegated to it by the United States Shipping Board pursuant to the authority contained in paragraph 35 of said Act and by the Secretary of Commerce since the abolishment of said Board and the transfer of its functions to the Secretary of Commerce pursuant to the so-called Economy Act and its amendments (5 U. S. C., 124, et seq.) and the Executive Order of the President issued pursuant to said Economy Act dated June 10, 1933, effective August 10, 1933.

The United States as the result of the shipbuilding program initiated by the United States during the World War, owned and controlled, a large number of merchant steamships. Pursuant to the provisions of the said Merchant Marine Act, 1920, the United States Shipping Board was mandated by Congress to sell the said ships as speedily as possible and also, in order to carry out the purposes of said Act, which were to develop and encourage the maintenance of a merchant marine of the United States sufficient to carry the greater portion of the commerce of the United States and to serve as a naval and military auxiliary in time of war, to determine what steamship lines should be established and put in operation from ports in the United States to foreign ports. A number of said steamship lines were established and put in operation and as rapidly as possible were transferred to private ownership. The Secretary of Commerce as the successor of the United States Shipping Board, is now maintaining and operating a small number of said steamship lines which are still considered [fol. 82] necessary to accomplish the purposes of said Act and for which purchasers have not yet been procured. The said steamship lines are being operated for the United States by and through the United States Shipping Board Merchant Fleet Corporation, which corporation has appointed various private corporations as the managing

agents of the United States to manage and operate the said steamship lines. The said steamship lines are operated in competition with steamship lines owned by foreign companies but every effort possible has been made to prevent the said steamship lines owned by the United States being operated in competition with lines which are owned by citizens of the United States, and such competition is kept to the lowest possible minimum. The United States Shipping Board Merchant Fleet Corporation owns no steamships, and operates and controls no steamships except those owned by the United States and under the direction and control of the Secretary of Commerce.

All monies received by the said corporation from the operation of ships or from any other activity of said corporation are the property of the United States and are subject to the annual direction of Congress as expressed, since the abolishment of the United States Shipping Board and the transfer of its functions to the Department of Commerce, in the Appropriation Acts for the Department of Commerce. The said Appropriation Acts appropriate all of said monies and any other monies that may be in the possession of said corporation for the expenses of said corporation, including the costs of administration, salaries of employees of said corporation, the losses due to the maintenance and operation of said ships, for other specific purposes and for carrying out the provisions of the Merchant Marine Act, 1920, as amended.

[fol. 83] The United States Shipping Board and the Secretary of Commerce, as its successor, has authorized and has encouraged the said private corporations acting as agents in managing and operating the steamship lines owned by the United States to become members of Conferences approved as required by Section 15 of the Shipping Act, 1916 (46 U. S. C. 801, et seq.) for the purpose of stabilizing rates and other practices obtaining in the particular routes which are served by said steamship lines.

[(Sgd.) Samuel D. Schell.*]

Subscribed and sworn to before me this — day of January, 1936. —— ——, Notary Public. My commission expires —— —, ——.

[File endorsement omitted.]

[* Signature in brackets, struck out in copy.]

[fol. 84] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF RALPH H. HALLETT

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Ralph H. Hallett, being duly sworn, deposes and says:

I am an Assistant Counsel in the office of the Solicitor of the Department of Commerce, and make this affidavit in support of the motion to quash service upon the defendants who have appeared specially herein.

On or about January 15, 1936, I requested the Chief Clerk of the Department of Commerce to furnish me with a certified copy of any order or orders issued by the Secretary of Commerce setting up the organization to administer the functions of the United States Shipping Board which had been transferred to the Department of Commerce pursuant to the provisions of Section 12 of Executive Order No. 6166.

Pursuant to said request, I received the certified copy of an order which is attached hereto.

Ralph H. Hallett.

Sworn to before me this 14th day of February, 1936.

[fol. 85] EXHIBIT TO AFFIDAVIT

Department of Commerce

Washington, January 16, 1936.

I hereby certify that the annexed is a true copy of the original Order dated August 9, 1933, issued by the Secretary of Commerce, setting up of a Bureau to be known as the United States Shipping Board Bureau, on file in the Office of the Chief Clerk, Department of Commerce.

(Sgd.) E. W. Libbey, Chief Clerk (Official Title).

Office of the Secretary

I hereby certify that E. W. Libbey who signed the foregoing certificate, is now, and was at the time of signing

Chief Clerk, Department of Commerce and that full faith and credit should be given his certificate as such.

In Witness Whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this sixteenth day of January, one thousand nine hundred and thirty-six.

(Sgd.) Daniel C. Roper, Secretary of Commerce.
(Seal.)

[fol. 86] Department of Commerce, Office of the Secretary, Washington

August 9, 1933.

Pursuant to the provisions of Section 12 of the Executive Order of June 10, 1933, transferring the functions of the United States Shipping Board including those over and in respect to the United States Shipping Board Merchant Fleet Corporation, to the Department of Commerce, there is hereby established in the Department of Commerce a Bureau to be known as the United States Shipping Board Bureau. The Bureau will be under the jurisdiction of Assistant Secretary Mitchell.

All units of the United States Shipping Board as of August 9, 1933, shall continue for the present to perform the same duties in said Bureau as heretofore performed under the Shipping Board.

All orders, rules, regulations, permits or privileges heretofore made, issued, or granted by United States Shipping Board and in effect on August 9, 1933, shall continue in effect until modified, superseded, or repealed. All decisions and official acts heretofore made or exercised by the United States Shipping Board shall be hereafter made or exercised by the Secretary of Commerce.

[fols. 87 & 88] All incoming correspondence, not addressed to a particular individual, shall be routed in the usual Departmental manner. Copies of all communications regarding questions of policy upon which the Secretary of Commerce has acted or has action pending before him, and matters which will require action by the Secretary of Commerce involving major policies, shall be immediately forwarded to Assistant Secretary Mitchell for transmission to the Secretary of Commerce. Correspondence or letters

relating to such matters shall be prepared under the direction of Assistant Secretary Mitchell for the signature of the Secretary of Commerce.

If the Secretary of Commerce deems it advisable he may refer any questions to an Advisory Committee for its advice. Said Advisory Committee will include in its membership the present members of the Shipping Board. It will receive the reports of any examiners appointed to investigate facts in connection with any proposed exercises of authority, and will report to the Secretary. The Advisory Committee will also advise the Secretary, if he so desires, as to the assignment of any matter to examiners for investigation and report.

(Signed) Daniel C. Roper, Secretary of Commerce.

[fol. 89] In United States District Court, Southern District of New York

Isbrandtsen-Moller Co., Inc., Complainant,

against

The United States of America, The Department of Commerce of the United States, the Shipping Board Bureau of the Department of Commerce of the United States, Daniel C. Roper, Individually and as Secretary of Commerce of the United States; James C. Peacock, Individually and as Director of the Shipping Board Bureau of the Department of Commerce of the United States, and Lamar Hardy, Individually and as United States Attorney for the Southern District of New York, Defendants

Before Chase, Circuit Judge; Bondy and Patterson, District Judges

Opinion—Filed April 8, 1936

In Equity. Suit in the District Court for the Southern District of New York to enjoin the defendants temporarily and permanently from enforcing an order of defendant Roper dated November 18, 1935 ostensibly made in the exercise of the functions formerly of the United States Shipping Board Bureau that were transferred to the De-

partment of Commerce by executive order No. 6166 promulgated June 10, 1933 to become effective August 10, 1933 under authority of the Executive Department Reorganization Act of 1932 as amended. (5 U. S. C. A. Sec. 124 et seq.) The hearing was by a court constituted in accordance with the provisions of Sec. 47 of Title 28 U. S. C. A. Bill dismissed.

[fol. 90] The bill alleged that the complainant was a New York corporation having its principal office in the Southern District of New York, authorized to operate, and operating, steamships and carrying cargoes in foreign commerce between the United States and other countries; that the Department of Commerce of the United States is an executive department of the government with offices in the District of Columbia; that the Shipping Board Bureau of the Department of Commerce of the United States is a bureau of the Department of Commerce with offices at the same place; that Daniel C. Roper is Secretary of Commerce of the United States who is the head of the Department of Commerce and an executive officer subject to the direction of the President of the United States; on information and belief that James C. Peacock resides in the District of Columbia and is Director of the Shipping Board Bureau of the Department of Commerce of the United States, Chairman of the Board of Trustees and President of the United States Merchant Fleet Corporation and as such is a member of the Steamship Conferences; and that Lamar Hardy is a resident of the Southern District of New York for which he is the United States Attorney.

It was alleged that the suit was an actual controversy arising under the constitution and laws of the United States brought in the Southern District of New York in accordance with the provisions of 28 U. S. C. A. Secs. 43, 44, 45 and 47; of the Shipping Act of 1916 (46 U. S. C. A. Sec. 830) and of the Judicial Code (28 U. S. C. A. Sec. 46) "to suspend, enjoin, set aside or annul an order issued [fol. 91] on the 18th day of November, 1935, by the defendant Daniel C. Roper, Secretary of Commerce of the United States, purporting to act on behalf of the defendant Department of Commerce and the defendant Shipping Board Bureau of said Department, as alleged successor of the United States Shipping Board."

The order follows:

"Department of Commerce, Office of the Secretary, Washington

In the Matter of Filing Rates and Charges by Common Carriers by Water in Foreign Commerce

Order

It appearing, That full and complete information as to the rates and charges for or in connection with the transportation of certain property from continental United States to points in foreign countries by carriers by water in foreign commerce subject to the Shipping Act, 1916, is necessary to the proper administration of the regulatory provisions of said act;

It appearing further, That Isbrandtsen-Moller Company, Inc., is a common carrier by water in foreign commerce subject to the Shipping Act, 1916;

It is ordered, In pursuance of the powers conferred by Section 21 of the Shipping Act, 1916, that Isbrandtsen-Moller Company, Inc., be, and it is hereby, notified and required to file with the Division of Regulation, United States Shipping Board Bureau, of this Department, at its office in Washington, D. C., on or before December 16, 1935 [fol. 92] each port-to-port and trans-shipment rate charged and/or collected by it during the period from September 1, 1935, to November 12, 1935, both dates inclusive, for the transportation of property, except cargo loaded and carried in bulk without mark or count, from all points in continental United States of America to all points in foreign countries; indicating plainly as to each such rate, the place from and to which it was charged and/or collected, the effective date thereof, and the name, in alphabetic order, of each commodity moving thereunder; showing also each terminal or other charge, privilege or facility, granted or allowed, and any rules or regulations which in anywise changed, affected, or determined any part of any such aforesaid rate, or the value of the service rendered to the consignor or consignee;

It is further ordered, That the aforesaid filing be in printed, typewritten, or mimeographed form, personally subscribed by an officer of said Isbrandtsen-Moller Com-

pany, Inc., who shall specify his title and verify the accuracy and completeness thereof under oath;

It is further ordered, That copy of this order be served upon said Isbrandtsen-Moller Company, Inc.

(Sgd.) Daniel C. Roper, Secretary of Commerce.

November 18, 1935."

It was also alleged that the complainant had unsuccessfully tried to have defendant Roper extend the time for [fol. 93] filing the required data to permit Congress to act in the matter and to have it kept only for the information of the Department of Commerce undisclosed to plaintiff's competitors on the ground that the true purpose of the order "was to obtain information to be made available to complainant's competitors to aid them in their endeavor to drive the complainant out of business" and because "the functions, powers and duties of the United States Shipping Board had never been validly transferred to the Department of Commerce or to the defendant Roper as head of that Department."

It was alleged that the defendants except Hardy asserted their right to exercise the wide powers of control and the discretionary judgment originally committed to the United States Shipping Board and the grounds for the allegation of the invalidity of the transfer of the functions and the Shipping Board to the Department of Commerce were set forth at length. They were briefly that the Shipping Board was made up of members appointed for a fixed term from different sections of the country so as to insure proper geographical representation; that said members were not removable except for inefficiency, neglect of duty, or misconduct in office; that complainant was advised and believed that Congress intended the Shipping Board "to be entirely independent of the President and of the various executive departments and to exercise semi-judicial powers like the Interstate Commerce Commission and the Federal Tariff Commission; and that Congress did not intend to authorize and, in fact has not authorized, an executive [fol. 94] bureau such as the Shipping Board Bureau of the Department of Commerce to exercise discretionary powers over the American shipping industry; that executive order No. 6166 of June 10, 1933 purporting to abolish the United States Shipping Board was ineffective for that

purpose in that the Shipping Board was an independent body free from executive control; and that the order of defendant Roper dated November 18, 1935 is null and void in that "the regulatory powers entrusted to the Shipping Board by the Shipping Act of 1916, in the attempted exercise of which said order was issued by the defendant Roper, could never be constitutionally exercised by an officer, board, bureau, agency, or department of the executive branch of the Government by reason of the separation of legislative, judicial and executive powers provided and guaranteed by the Constitution of the United States; "that there was no "adequate declaration of policy or standard of action" in the Executive Department Reorganization Act of 1932, to make it valid; and that the President promulgated executive order No. 6166 without adequate hearings and findings of fact on which to base it. Allegations that complainant had exhausted its administrative remedy against enforcement of the order; that it was subject to a daily penalty for non-compliance and that its only adequate remedy was in equity by way of injunction to prevent its being subjected to irreparable damage were followed by its prayer for relief.

A second cause of action alleged that defendant Roper had before November 18, 1935 transferred "all his func- [fol. 95] tions and duties in connection with the subject matter of said order to the defendant James C. Peacock" who had since undertaken "to exercise the functions committed to the United States Shipping Board by the Shipping Act, 1916, as amended;" that Peacock "as President and Chairman of the Board of Trustees of the United States Merchant Fleet Corporation did on November 18, 1935, and ever since has controlled steamships whose operators are members of conferences or groups of steamship companies combined by contract together to fix rates and otherwise further a shipping monopoly solely for the selfish purpose of making greater profits for certain steamship companies, most of which are owned by aliens residing in foreign countries, and most of whose vessels are operated under the flags of foreign countries, and to eliminate competition by any independent or non-conference company such as complainant;" and that "the separation of powers between the legislative, judicial and executive branches of

the Government and the Due Process Clause of the Fifth Amendment to the Constitution of the United States prohibit the exercise of regulatory or quasi-judicial functions such as were entrusted to the United States Shipping Board by the Shipping Act, 1916, by persons or agencies having interests and purposes above set forth, and therefore, render null and void the said order of November 18, 1935".

A third cause of action alleged that the order of November 18, 1935 was not issued for a public purpose authorized or designated by Congress but in aid of a monopoly composed of the complainant's competitors and to force the complainant which is an independent, unsubsidized, [fol. 96] non-conference line, either to join a conference or shipping monopoly, which it could not lawfully be compelled to join, or else to suffer serious damage to, if not complete destruction of, its business from the disclosure to its competitors, members of said conferences or shipping monopoly, of its private business records and rates charged and commodities moved by it."

A fourth cause of action alleged unjust discrimination against complainant in ordering it "to file actual rates charged by it on particular goods between named ports, whereas the only order issued by the defendants to complainant's competitors, the said Conference Lines, requires merely the filing of general rate schedules which are not always adhered to, and which need not be adhered to under any law or government regulation"; and that "the only order issued by the defendants to said competitors was not issued under Sec. 21 or any other section of the Shipping Act, 1916, and carried no penalties for non-observance."

A fifth cause of action added allegations that the complainant had promptly sought relief; had offered to furnish the required data provided it was not revealed to its competitors or made public; and that the suit was brought in good faith.

Upon the bill of complaint supported by affidavit, the complainant moved for a temporary injunction as prayed for. The Department of Commerce of the United States, The Shipping Board Bureau of the Department of Commerce of the United States, and James C. Peacock, individually and as Director of The Shipping Board Bureau

[fol. 97] of the Department of Commerce of the United States, appeared specially and moved to quash the service of subpoenas upon them and to dismiss the bill as to them "for want of proper jurisdiction and venue". An order to show cause why the temporary injunction should not be issued was duly made. The other defendants appeared generally and moved to dismiss the bill on the merits. These motions were argued at the hearing on the order to show cause.

Davis, Polk, Wardwell, Gardiner & Reed, Solicitors for Complainant.

Lamar Hardy, U. S. Attorney for the Southern District of New York, Solicitor for Defendants;

John F. Davison, Assistant U. S. Attorney;

Ralph H. Hallett, Assistant Counsel, Department of Commerce;

Richard J. Burke, Special Assistant to the United States Attorney, Of Counsel.

CHASE, Circuit Judge:

The service upon the defendants who have appeared specially was not made within the Southern District of New York but instead within the District of Columbia. That is the real ground of the motion to quash. But it is clear that this court has jurisdiction over the subject matter of the cause of action and that as the complainant resides within the Southern District of New York the venue is in accordance with the provisions of 28 U. S. C. A. Sec. 43. And Sec. 44 of the same title provides that in cases of the class in which this one falls "The order, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States". These sections related to suits in regard to orders of the [fol. 98] Interstate Commerce Commission and by Sec. 31 of the Shipping Act of 1916 (46 U. S. C. A. Sec. 830) were made to apply to similar suits relating to orders of the Shipping Board. Hence the service upon those defendants in the District of Columbia was good and the issue on their motion is narrowed to whether or not they are proper parties. This in turn depends upon whether they have any interest in the cause of action.

The Executive Department Reorganization Act of June 30, 1932, amended Mar. 3, 1933, (5 U. S. C. A. Sec. 124 et

seq.) provided that the President should investigate and determine what changes were necessary in the executive and administrative agencies of the government to accomplish stated ends, among them to reduce expenses and increase efficiency; and gave him the power to

"(a) Transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency;

(b) Consolidate the functions vested in any executive agency; or

(c) Abolish the whole or any part of any executive agency and/or the functions thereof; and

(d) Designate and fix the name and functions of any consolidated activity or executive agency and the title, powers, and duties of its executive head; except that the President shall not have authority under this title to abolish or transfer an executive department and/or all the functions thereof."

[fol. 99] And it was further provided in Sec. 130, that, "Whenever the President makes an Executive order under the provisions of this chapter, such Executive order shall be submitted to the Congress while in session and shall not become effective until after the expiration of sixty calendar days after such transmission, unless Congress shall by law provide for an earlier effective date of such Executive order or orders." Executive agency was defined to be "any commission independent establishment, board, bureau, division, service of office in the executive branch of the Government * * *". Executive Order No. 6166 in Sec. 12 provided that, "The functions of the United States Shipping Board including those over and in respect to the United States Shipping Board Merchant Fleet Corporation are transferred to the Department of Commerce and the United States Shipping Board is abolished." The order was transmitted to Congress as required and became effective August 10, 1933. Thus the Department of Commerce was made to take over the functions of the Shipping Board. But it is a part of the executive establishment of the United States and a suit against it is in reality a suit against the United States. The

United States was made a party to this suit and is a necessary party. 28 U. S. C. A. Sec. 46; Illinois Central Railroad Co. v. Public Utilities Commission, 245 U. S. 493. As the United States has consented to be sued and is a party and neither one of its departments nor any subdivision of such department can have any interest in the action [fol. 100] other or different than that of the United States itself they appear to have no interest which will support the contention that they are proper parties and the motion to dismiss as to them is granted. Nor has defendant Peacock either individually or otherwise any interest in the suit. He did not issue the order which is under attack. So the motion in his behalf will be granted.

Further decision must turn on the sufficiency of the bill on the merits. It is clear that it should be dismissed as to defendant Hardy who is not alleged to have had any connection with the subject matter of the suit, it being alleged merely that he is the United States Attorney for the Southern District of New York. As to the remaining defendants the issue has two aspects; (1) whether the Executive Department Reorganization Act, as amended, (5 U. S. C. A. Sec. 124 et seq.) authorized the President to abolish the Shipping Board and transfer its functions to the Department of Commerce and (2) whether, if so, Congress had the power so to do.

As to (1) it may be said that it is doubtful whether the Shipping Board was fairly within the definition of the term "executive agency" found in Sec. 125 of the Act. It would appear more nearly correct to have considered it a board of specially selected members with neither political nor executive functions whose duties were quasi-judicial and quasi-legislative like those of the Federal Trade Commission. See Humphrey's Executor v. United States, 295 U. S. 602. But doubt as to whether the Executive Department [fol. 101] Reorganization Act was intended by Congress to confer upon the President the authority he exercised in respect to the Shipping Board must be resolved against the complainant in view of the fact that after the order had been promulgated Congress adopted the construction thus given the Act by permitting the order to become effective after notice to it and the expiration of the prescribed time and also by passing on April 7, 1934 the Department of Commerce Appropriation Act (48 Stat. 546-566) pro-

viding funds to pay the salaries and expenses of that department, inter alia, "To carry out the provisions of the Shipping Act of 1916, as amended, and the Merchant Marine Acts of 1920 and 1928, as amended, (U. S. C. A. title 46 secs. 804, 805, 861-889; * * *; Executive Order numbered 6166, June 10, 1933) * * *." Again on March 22, 1935 it provided funds for the same department for another fiscal year using similar language. We think all this amply shows that Congress intended to confer upon the President authority to abolish the Shipping Board and transfer its functions to the Department of Commerce.

There remains only the question of the power of Congress to do that. On this point we are concerned with power regardless of the wisdom or effect of its exercise as a matter of good public policy. Much of the complainant's argument has been directed to the public benefit which would flow from keeping the functions formerly of the Shipping Board independent and free from the direct control an executive can exert over the Department of Commerce. Perhaps that is so but that is for Congress to decide in the [fol. 102] performance of its duty to legislate in the public interest and so long as it acts within the scope of its power as the national legislature its choice of means and methods are to be given effect.

It is not, nor could it successfully be, disputed that Congress had the power to delegate to the Shipping Board in the manner it did so, the powers and duties that board possessed before Executive Order No. 6166 was promulgated. The change which has been made clothes an executive department with the same powers and duties to be exercised in the same way as before. We think that the same powers and duties which were properly delegated to the Shipping Board could be so delegated to any other person or body to which Congress should see fit to cause them to be transferred. It elected to have the President investigate and decide what should be done in this regard in the furtherance of efficiency and economy and then adopted his decision. The result was to abolish a board whose existence was dependent upon the will of Congress and to delegate to the Department of Commerce the same powers and duties the board had possessed. This seems in accord with correction standards as to delegation of authority to act within proper limits prescribed by Con-

gress. See, Panama Refining Co. v. Ryan, 293 U. S. 495. Whether the delegation, assuredly proper in subject matter and law fully defined in scope, purpose and manner of exercise, should have been to an executive department was within the sound discretion of Congress. As it did not confer upon anyone functions it was bound to keep and exercise for itself, there was no failure to preserve the required [fol. 103] separation of governmental powers. Regulatory powers wide in scope have been lawfully conferred upon the Secretary of Agriculture. Stafford v. Wallace, 258 U. S. 495; Tagg Bros. v. United States, 280 U. S. 420. Upon the Secretary of Labor. Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320. And upon the Secretary of the Interior. United States ex rel Riverside Oil Co. v. Hitchcock, 190 U. S. 316.

The allegation that the President acted without adequate hearings and findings is but a conclusion. His order stated that he had investigated and the contrary not appearing, the presumption of regularity is sufficient to support the official act of a public officer. United States v. Chemical Foundation, 272 U. S. 1; Dakota Central Telephone Co. v. So. Dakota, 250 U. S. 163. The bill contains its own refutation of the charge of unjust discrimination because other steamship companies have not been subjected to a like order. It is alleged that this complainant is in a different situation from those against whom a different order was issued. There is no showing that there has been any arbitrary or intentionally unfair discrimination against this complainant in favor of others in like situation. See Mackay Telegraph & Cable Co. v. City of Little Rock, 250 U. S. 94. Nor is the fact that the complainant was subject to a penalty sufficient to show irreparable injury. Though it was one hundred dollars per day it may well be only enough to encourage compliance without discouraging resort to the courts where, as here, there are reasonable [fol. 104] grounds for so doing. See Life & Casualty Ins. Co. of Tenn. v. McCray, 291 U. S. 566.

Motion for an injunction denied and bill dismissed.

In re Isbrandtsen-Moller Co., Inc.
Concur: Wm. Bondy, D. J.

In re Isbrandtsen-Moller Co., Inc.
Concur: R. P. Patterson, D. J.

[fol. 105] [File endorsement omitted.]

[fol. 106] IN UNITED STATES DISTRICT COURT

Present: Honorable Harrie B. Chase, Circuit Judge. Honorable William Bondy, District Judge. Honorable Robert P. Patterson, District Judge.

E 82-92

ISBRANDTSEN-MOLLER CO., INC., Complainant,

against

THE UNITED STATES OF AMERICA, THE DEPARTMENT OF COMMERCE OF THE UNITED STATES, The Shipping Board Bureau of the Department of Commerce of the United States, Daniel C. Roper, Individually and as Secretary of Commerce of the United States; James C. Peacock, Individually and as Director of the Shipping Board Bureau of the Department of Commerce of the United States, and Lamar Hardy, Individually and as United States Attorney for the Southern District of New York, Defendants

FINAL DECREE—May 22, 1936

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

[fol. 107] Ordered, Adjudged and Decreed that the complainant's motion for an interlocutory injunction until entry of the final decree herein be, and the same hereby is, denied in all respects; and it is

Further Ordered, Adjudged and Decreed that the motion of the defendants, The Department of Commerce of the United States, The Shipping Board Bureau of the Department of Commerce of the United States, and James C. Peacock, individually and as Director of The Shipping Board Bureau of The Department of Commerce of the United States, to dismiss the bill of complaint as to them for want of proper jurisdiction and venue be, and the same hereby is, granted on the ground that they are not proper parties to this suit; and it is

Further Ordered, Adjudged and Decreed that the motion of the defendants, United States of America, Daniel C. Roper, individually and as Secretary of Commerce of the

United States, and Lamar Hardy, individually and as United States Attorney for the Southern District of New York, to dismiss the bill of complaint for failure to state facts sufficient to constitute a cause of action be, and the same hereby is, granted in all respects, and the bill of complaint be, and the same hereby is, dismissed with costs to be taxed.

Harrie B. Chase, U. S. C. J. Wm. Bondy, U. S. D. J.
Robert P. Patterson, U. S. D. J.

[fol. 108] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Your petitioner, Isbrandtsen-Moller Co., Inc., respectfully shows:

On January 3, 1936, a bill of complaint was filed by complainant in the above entitled cause in the United States District Court for the Southern District of New York, and shortly thereafter an application was filed by complainant for an interlocutory injunction under Section 31 of the Shipping Act, 1916 (46 U. S. Code Sec. 830) and under 26 U. S. Code Secs. 46 and 47, restraining the enforcement of [fol. 109] the order of November 18, 1935, made by the defendant Roper, Secretary of Commerce, purporting to be in pursuance of the powers conferred on the United States Shipping Board by Section 21 of the Shipping Act 1916, said order requiring the complainant to file on or before December 16, 1935, the freight rates it had charged during the period from September 1, 1935, to November 12, 1935, with a list of the commodities moving thereunder, and the ports between which such commodities were carried.

On January 22, 1936, the defendants United States of America, Daniel C. Roper, individually, and as Secretary of Commerce, and Lamar Hardy, individually, and as United States Attorney for the Southern District of New York, served a notice of cross-motion to dismiss the bill of complaint and petition as against them for failure to state facts sufficient to constitute a cause of action in equity.

On January 22, 1936, the defendants Department of Commerce of the United States, the Shipping Board Bureau of the Department of Commerce of the United States, and James C. Peacock, individually and as Director of the Shipping Board Bureau of the Department of Commerce of the United States, served a special appearance and notice of cross-motion and affidavit to quash the alleged service of process upon those defendants, to vacate and set aside returns of the Marshal, and to dismiss the complaint and petition as against them for want of proper jurisdic-
[fol. 110] tion and venue.

The said application for an interlocutory injunction and the said motion to dismiss as to certain defendants for failure to state facts sufficient to constitute a cause of action and the said motion to quash process as to certain other defendants thereafter regularly came on for hearing before three judges, and after taking the matter under submission the said three judges filed a written opinion and on the 22nd day of May, 1936, filed and entered a final decree, granting said motion to dismiss of certain defendants and the said motion to quash process of certain other defendants and denied the application for an interlocutory injunction.

The said final decree is greatly to the prejudice of your petitioner and is erroneous and inequitable.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignments of error and prayer for reversal, filed with the clerk pursuant to Rule 9 of the Rules of the United States Supreme Court; and there has been likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rule 12 of the Rules of the United States Supreme Court.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained of, your petitioner prays for the allowance of an appeal in said cause to the Supreme Court of the United States agreeable to the statutes and rules of said Court in [fols. 111 & 112] such cases made and provided, and that a proper order touching the security required of the petitioner may be made.

May 22, 1936.

Theodore Kiendl, Counsel for Appellant. Davis, Polk, Wardwell, Gardiner & Reed, Of Counsel.

[fol. 113] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

Appellant, Isbrandtsen-Moller Co., Inc. assigns the following errors in the record and proceedings in the above entitled cause:

1. The Court erred in failing to hold that it was not the intent of Congress that the United States Shipping Board be abolished and its functions transferred to defendant Department of Commerce.

2. The Court erred in failing to hold that it was the purpose of Congress in creating the Shipping Board to create an independent, regulatory board performing quasi-legislative, quasi-judicial functions.

[fol. 114] 3. The court erred in failing to hold that in passing the amended Economy Act of March 3, 1933, Congress did not intend that the powers of independent regulatory boards, such as the Shipping Board, be transferred to the executive branch of the government.

4. The court erred in failing to hold that Congress has not ratified the purported transfer of the functions of the Shipping Board to defendant Department of Commerce.

5. The court erred in failing to hold that even if it be assumed that it was the intent of Congress that the functions of the Shipping Board be transferred to defendant Department of Commerce, Congress is without authority under the Constitution to do so.

6. The court erred in failing to hold that the transfer of the regulatory functions of the Shipping Board to the Department of Commerce is in contravention of the well established principle that the three branches of Government be kept separate and distinct.

7. The court erred in failing to hold that the purported transfer of the regulatory functions of the Shipping Board to defendant Department of Commerce amounts to an unconstitutional delegation of legislative power.

8. The court erred in failing to hold that the effect of the order of defendant Secretary of Commerce of November 18, 1935, is to deprive complainant of fundamental rights guaranteed to it by the Constitution.

9. The court erred in failing to hold that the order of November 18, 1935, deprives complainant of its property without due process of law.

[fol. 115] 10. The court erred in failing to hold that the order of November 18, 1935 is unconstitutional on the further ground that it amounts to an unreasonable search and seizure and within the meaning of the Fourth Amendment.

11. The Court erred in holding that Executive Order No. 6166, issued June 10, 1933, was transmitted to Congress as required by law, and that it became effective August 10, 1933, Congress having in fact adjourned on June 16, 1933, shortly after transmission of said Executive Order to Congress, so that the statutory condition was not complied with that no such order should be valid or effective unless submitted to Congress while in session for a period of sixty days before the proposed or designated effective date of the order.

12. The Court erred in holding that by Executive Order No. 6166, the Department of Commerce was by law made to take over the functions of the Shipping Board.

13. The Court erred in holding that the United States Shipping Board has ever been an executive agency in any of the executive departments, or has been an executive agency, or a part of the executive establishment of the United States.

14. The Court erred in holding that neither the Department of Commerce of the United States nor the Shipping Board Bureau of the Department of Commerce of the United States is a proper party to this suit, or has any interest in it.

15. The Court erred in holding that the defendant Peacock neither individually nor otherwise has any interest in this suit and is not a proper party.

[fol. 116] 16. The Court erred in holding that defendant Peacock did not in effect issue, or substantially participate

in issuing, the defendant Roper's order of November 18, 1935.

17. The Court erred in holding that defendant Hardy had no connection with this suit, and that there is no allegation in the bill of complaint that he had such connection.

18. The Court erred in holding that the Executive Department Reorganization Act, as amended (5 U. S. C. A. Sec. 124 et seq.) authorized the President to abolish the United States Shipping Board and to transfer its functions to the Department of Commerce.

19. The Court erred in holding that Congress had the power under the Constitution of the United States to delegate to the President of the United States the power to abolish the United States Shipping Board and to transfer its functions to the Department of Commerce.

20. The Court erred in holding that the United States Shipping Board was an executive agency as defined or found in Section 125 of the Economy Act or of that Act as amended.

21. The Court erred in failing to hold that the United States Shipping Board was a board whose duties were quasi judicial and quasi legislative like those of the Federal Trade Commission.

22. The Court erred in failing to hold that the President had no power to remove from office without just or reason-[fol. 117] able cause any one or all of the Commissioners of the United States Shipping Board after they had been appointed for unexpired terms of years, and after their nominations had been confirmed by the Senate.

23. The Court erred in holding that the Executive Department Reorganization Act was intended by Congress to confer upon the President the authority he attempted to exercise in respect of the United States Shipping Board.

24. The Court erred in holding that after Executive Order No. 6166 had been promulgated, Congress ratified it or adopted the construction thus given the Executive Department Reorganization Act by permitting the order to become effective after notice to it and the expiration of the prescribed time.

25. The Court erred in holding that Congress ratified Executive Order No. 6166 by passing on April 7, 1934, the Department of Commerce Appropriation Act (48 Stat. 546-566) providing funds to pay the salaries and expenses of that department.

26. The Court erred in holding that Congress ratified Executive Order No. 6166 on March 22, 1935, by providing funds for the use of the Department of Commerce for another fiscal year.

27. The Court erred in holding that Congress intended to confer upon the President authority to abolish the Shipping Board and transfer its functions to the Department of Commerce.

[fol. 118] 28. The Court erred in holding that Congress had the power under the Constitution of the United States to delegate to an executive department or to any other person or body the powers and duties possessed by the United States Shipping Board.

29. The Court erred in holding that Congress had the power under the Constitution of the United States to delegate to the President the power to investigate and decide, even to the extent of abolition, what should be done in connection with the United States Shipping Board in the furtherance of efficiency and economy.

30. The Court erred in holding that Congress adopted the decision of the President with respect to abolition of the United States Shipping Board or the transfer of its functions to the Department of Commerce.

31. The Court erred in holding that the delegation of authority to the President in the Economy Act, or in that Act as amended was, if so broadly construed as to include abolition of the Shipping Board, a delegation in accord with correct standards as to delegation of authority to act within proper limits prescribed by Congress.

32. The Court erred in holding that the delegation of power to the President as broadly construed by the Court was proper in subject matter or lawfully defined in scope, purpose or manner of exercise.

33. The Court erred in holding that judicial functions of the United States Shipping Board were lawfully trans-

[fol. 119] ferred by the President by delegated authority from Congress to an Executive Department.

34. The Court erred in holding that legislative functions of the United States Shipping Board were lawfully transferred by the President by delegated authority from Congress to an Executive Department.

35. The Court erred in holding that Congress can lawfully under the Constitution of the United States delegate to the President the power to in turn delegate legislative or judicial power to an Executive Department.

36. The Court erred in holding that Congress cannot only delegate legislative power but can delegate to a person the power to delegate Congress' legislative power to a third person.

37. The Court erred in ignoring the uncontradicted evidence, consisting of the affidavit of Hans Isbrandtsen, by holding that the defendant Roper held any hearing or made any finding preliminary to issuing his order of November 18, 1935.

38. The Court erred in holding, without any evidence whatever to support it, that the President held a hearing or acted with adequate hearing or made a finding before purporting to exercise Congress' legislative power in abolishing the United States Shipping Board and transferring its functions to the Department of Commerce.

[fol. 120] 39. The Court erred in ignoring the uncontradicted verified allegations in the bill of complaint, and in ignoring the uncontradicted evidence, consisting of the affidavits of Hans Isbrandtsen and in holding that there is no showing or evidence that there has been any arbitrary or intentionally unfair discrimination against the complainant in favor of others in like situation.

40. The Court erred in ignoring the uncontradicted allegations in the verified complaint, and the uncontradicted affidavits of Hans Isbrandtsen, in holding that no unjust discrimination was alleged or shown on the ground that the steamship companies have not been subjected to a like order.

41. The Court erred in holding that the fact that the complainant was subject to a penalty was not sufficient to

entitle it to an interlocutory injunction or to show irreparable injury.

42. The Court, in view of its finding that there was reasonable ground for complainant to resort to the courts, erred in holding that the penalty imposed on complainant by defendant Roper's order of November 18, 1935, was only enough to encourage compliance without discouraging resort to the courts.

43. The Court erred in denying the application by complainant for an interlocutory injunction.

44. The Court erred in dismissing the bill of complaint.

[fol. 121] 45. The Court erred in holding that complainant was lawfully required to comply with defendant Roper's order of November 18, 1935, after the defendant Roper had declined to accept complainant's offer to supply any data desired for the Department of Commerce's own information and had asked only that the details of complainant's business and of complainant's customers' business should not be made available by defendant Roper to complainant's competitors, the Conference Lines or Steamship Combination; and after the defendant Roper had made it clear to complainant that the Department of Commerce intended to give the Conference Lines the benefit of the data which complainant had ordered to file.

46. The Court erred in holding that complainant which was not a member of any Conference could lawfully be compelled by defendant Roper by the order of November 18, 1935, to file rates and other data which Conference Members were already by law compelled to file by section 15 of the Shipping Act, 1916, because such Conference Members were violating the Sherman Anti Trust Act of Congress, and it was only by approval by the Shipping Board of the Conference Members' agreements as to rates that the Conference Members could escape prosecution under the provisions of the Anti Trust Laws of the United States.

47. The Court erred in failing to hold that defendant Roper's order of November 18, 1935, was invalid and un-[fol. 122] justly discriminatory against complainant in requiring it to file actual rates charged and list actual shipments moved and geographical points between which such

shipments moved, thus, if the order were complied with, disclosing the innermost private trade details of complainant's business to its competitors, the Conference Lines or Shipping Combination, whereas the Conference Lines have never been required by defendant Roper or the Shipping Board to do anything but file general rate schedules under section 15 of the Shipping Act, 1916, which schedules are not always, and under the law or by any order of defendant Roper or of the Shipping Board, need not be adhered to by them.

48. The Court erred in failing to hold that it was unlawful for the defendant Roper by his order of November 18, 1935, to single complainant out for special discriminatory treatment and require it to file actual rates charged on particular goods between named ports, whereas no such requirement has ever been made of any other steamship company, American or foreign, operating or ever operated, in the foreign trade of the United States.

49. The Court erred in holding that the Department of Commerce or the United States Shipping Board is authorized by law to publish rates or the other information re- [fol. 123] quired by defendant Roper's order of November 18, 1935, to be filed.

50. The Court erred in holding that the Department of Commerce or the United States Shipping Board is authorized to regulate or stabilize rates of common carriers by water in the foreign trade of the United States.

51. The Court erred in holding in effect that the Department of Commerce or the United States Shipping Board is authorized by law to engage in a fishing expedition into the private records and business of complainant in the hope of obtaining evidence of some discrimination against the shippers, ports, or localities in the absence of any complaint or charge made or filed against complainant by a shipper, port or locality, or by the Shipping Board or Department of Commerce, that such a discrimination has been made, or that reasonable ground exists for believing that such a discrimination has been made.

52. The Court erred in holding that defendant Roper's order of November 18, 1935, would have been valid if it had been issued by the United States Shipping Board.

53. The Court erred in holding that Executive Order No. 6166 was valid.

[fol. 124] 54. The Court erred in holding that defendant Roper's order of November 18, 1935, was issued in pursuance of powers conferred by section 21 of the Shipping Act, 1916 (46 U. S. C. sec. 820), or was necessary or proper to the administration of any regulatory provisions of that Act.

55. The Court erred in holding in effect that the defendants are authorized to aid complainant's competitors and seriously injure complainant's business by procuring information regarding complainant's private business by means of defendant Roper's order of November 18, 1935, and revealing it to complainant's competitors.

56. The Court erred in holding that Congress ratified the President's action by Executive Order No. 6166 in attempting to abolish the United States Shipping Board and transfer its functions to the Department of Commerce.

57. The Court erred in not holding that the order of November 18, 1935, of the defendant Roper was invalid.

58. The Court erred in not holding that the Executive Order No. 6166 of June 10, 1935 was invalid in so far as it purported to abolish the United States Shipping Board, and to transfer all its functions to the Department of Commerce.

[fol. 125] 59. The Court erred in failing to hold that the United States Shipping Board consisted of Commissioners who were to constitute a geographically representative national board and who were required to be appointed respectively from different sections of the country so as to insure proper geographical representation, and that once they were appointed for fixed terms of years, and their nominations conferred, they could not be lawfully removed from office by the President excepting for inefficiency or misconduct.

60. The Court erred in failing to hold that the United States Shipping Board was obviously intended by Congress to be entirely independent of the President and of the various Executive Departments, and to exercise quasi-

judicial powers like the Interstate Commerce Commission and the Federal Tariff Commission.

61. The Court erred in holding that a subordinate bureau in an executive department, or an executive department itself, is entitled to exercise the wide powers of control and the discretionary judgment committed by Congress to the United States Shipping Board of several nationally representative Commissioners.

62. The Court erred in holding that Congress ever intended to authorize, or in fact authorized, an executive department or bureau to exercise discretionary powers over the shipping industry of the United States such as had been conferred on the United States Shipping Board.

63. The Court erred in holding that the details of complainant's private business and of complainant's customers' business could lawfully be required by defendant Roper's order of November 18, 1935, to be made available to complainant's competitors the so called Conference Lines, Shipping Combination, or Steamship Monopoly.

[fol. 126] 64. The Court erred in failing to hold that the defendant Roper's order of November 18, 1935, was in substance an unlawful effort to foster a monopoly which is predominately foreign and which has as its avowed purpose to monopolize transportation of United States foreign commerce.

65. The Court erred in failing to hold that defendant Roper's order of November 18, 1935, was issued not for a public interest but to further the selfish interest of the Conference Lines or Steamship Combination, and to hamper and destroy independent competition by complainant, a non-conference line, and to deprive American exporters of the advantages accruing to them from independent steamship competition.

66. The Court erred in failing to hold that defendant Roper's order of November 18, 1935, was invalid because no shipper had ever made any complaint against complainant or its methods.

67. The Court erred in holding in effect that defendant Roper by the order of November 18, 1935, could lawfully

prevent any independent ocean carrier like complainant from invading the waters of the United States except on condition that it alone of all steamship companies disclose to its competitors its actual busines transactions, designated commodities carried, rates actually charged, and points between which the commodities were carried.

68. The Court erred in failing to hold that the defendant Roper's order of November 18, 1935, was an attempt [fol. 127] to foster and further a shipping monopoly of all steamship owners in the foreign freight service of the United States by stabilizing, freezing, or fixing rate structure by compelling complainant, a non-conference and independent steamship line, to disclose to its competitors enough knowledge of its private steamship business and of actual goods carried by it between named ports at actual rates to enable complainant's competitors, the conference lines or steamship combination, to compete unfairly with and seriously and irreparably injure complainant.

69. The Court erred in failing to hold that the three Commissioners of the United States Shipping Board appointed by the President under the Economy Act, and confirmed by the Senate, continued in office until their successors should be appointed, and that as no such successors have been appointed, they and not the Department of Commerce constituted the United States Shipping Board at the time the defendant Roper's order of November 18, 1935, was issued.

70. The Court erred in failing to hold that Congress itself in one part of the Economy Act undertook to reorganize the Shipping Board and provide for its continued existence through Commissioners to be appointed for fixed terms of years and not removable by the President except for inefficiency or misconduct, and therefore obviously did not intend, by the other part of the same Act relied on by defendants, to authorize the President to do that which it had just done, or provided for, itself.

[fols. 128 & 129] For which errors the appellant, Isbrandtsen-Moller Co., Inc., prays that the said final decree of the District Court of the United States for the Southern Dis-

trict of New York, filed and entered on the 22nd day of May, 1936, in the above-entitled cause, be reversed and a judgment rendered in favor of the appellant and for costs.

Dated, May 22, 1936.

Theodore Kiendl, Counsel for Appellant. Davis, Polk, Wardwell, Gardiner & Reed, Of Counsel.

[fol. 130] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The petition of Isbrandtsen-Moller Co., Inc., the complainant in the above entitled cause, for an appeal in the above entitled cause to the Supreme Court of the United States from the judgment of the District Court of the United States for the Southern District of New York, having been filed herein, accompanied by an assignment of errors and statement as to jurisdiction, all as provided by Rules 9 and 12 of the Rules of the United States Supreme Court, and the said papers having been presented to this court and the record in this cause having been considered;

It is hereby Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from [fol. 131 & 132] the final decree of the District Court of the United States for the Southern District of New York, entered in this cause on the 22nd day of May, 1936, and that the Clerk of the said District Court of the United States for the Southern District of New York shall within one day from this date make and transmit to the Supreme Court of the United States, under his seal and the seal of the Court, a true copy of the material parts of the record herein, which shall be designated by præcipe or a stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that the said appellant shall give a good and sufficient cost bond in the sum of $250.00, conditioned as required by law.

Done by the Court this 22nd day of May, 1936.

Alfred C. Coxe, United States District Judge.

——, United States District Judge.

[fols. 133-137] Bond on appeal for $250.00 omitted in printing.

[fol. 138] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to wit:

1. Bill of Complaint and Petition of January 3, 1936, with Proof of Service.
2. Order to Show Cause of January 3, 1936, with annexed Affidavit of Hans Isbrandtsen of January 3, 1936.
3. Order (Judge Caffey) setting application for hearing before Judge Bondy.
4. Order (Judge Bondy) setting application for hearing before Circuit Judge Chase and District Judges Patterson and Bondy.

[fol. 139] 5. Cross Motion to Dismiss (January 21, 1936) Notice of.

6. Special Appearance and Cross Motion to Dismiss (January 21, 1936) Notice of, with annexed Affidavit of John F. Davidson, of January 21, 1936.
7. Affidavit of Hans Isbrandtsen of February 18, 1936, with annexed Exhibits A, B, C and D.
8. Affidavit of Harry S. Brown, filed February 14, 1936.
9. Affidavit of Ralph H. Hallett, filed February 14, 1936.
10. Opinion of Court filed.
11. Final Decree.
12. Petition for Appeal.
13. Assignment of Errors.
14. Citation.
15. Bond on Appeal.
16. Order allowing Appeal.
17. Stipulation as to true and complete Record.
18. This præcipe and service thereon.

Said transcript to be prepared as required by law and the rules of this court and the rules of the Supreme Court

of the United States, and to be filed in the office of the clerk of the Supreme Court of the United States, on or before the 23rd day of May, 1936.

Dated, May 22, 1936.

Davis, Polk, Wardwell, Gardiner & Reed, and Theodore Kiendl, Solicitors for Complainant.

[fol. 140] [Endorsed:] Copy received May 22, 1936. Lamar Hardy, Solicitor for Defendant.

[fol. 141] In United States District Court

[Title omitted]

Defendants-Appellees Præcipe for Transcript of Record —Filed June 2, 1936

Sirs:

Please Take Notice that the following papers will constitute the transcript of the record of this Court in this suit to be filed in the Supreme Court of the United States pursuant to an appeal heretofore allowed herein, in addition to the papers included in the Complainant-Appellant's præcipe dated May 22, 1936:

1. Affidavit of Samuel D. Schell.
2. Statement of jurisdiction of the Supreme Court of the United States, pursuant to Supreme Court Rule 12.
3. Proof of service of appeal papers, pursuant to Supreme Court Rule 12.

[fols. 142 & 143] 4. This præcipe and service thereon.

5. Any stipulation the parties may enter concerning correctness of copies of the papers in the transcript of record.

Dated, New York, N. Y., June 1, 1936.

Lamar Hardy, United States Attorney for the Southern District of New York, Solicitor for Defendants.

To Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Solicitors for Complainant, 15 Broad Street, New York, N. Y. The Clerk of the District Court, Southern District of New York.

It is hereby agreed that the complainant's Præcipe dated May 22, 1936, and the Defendant's Præcipe dated June 1,

1936, enumerate all the papers to constitute the transcript of record on appeal to the Supreme Court of the United States in this case.

Davis, Polk, Wardwell, Gardiner & Reed, and Theodore Kiendl, Solicitors for Complainant. Lamar Hardy, U. S. Attorney, Solicitor for Defendant.

Dated, New York, N. Y., June 1, 1936.

So Ordered: Wm. Bondy, U. S. D. J.

[File endorsement omitted.]

[fols.144-152] Citation, in usual form, showing service on Lamar Hardy, Filed May 22, 1936, omitted in printing.

[fol. 153] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 154 & 155] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed August 24, 1936

Come now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated, May 22, 1936.

Theodore Kiendl, Counsel for Appellant. Davis, Polk, Wardwell, Gardiner & Reed, of Counsel.

[fol. 156] [File endorsement omitted.]

Endorsed on cover: Enter Theodore Kiendl. File No. 40,847. S. New York D. C. U. S. Term No. 307. Isbrandtsen-Moller Co., Inc., appellant, vs. The United States of America, et al. Filed August 24, 1936. Term No. 307, O. T. 1936.